No. 16-299	
Title:	**National Association of Manufacturers, Petitioner** **v.** **Department of Defense, et al.**
Docketed:	September 7, 2016
Linked with 16A11, 17A146	
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(15-3751)
Decision Date:	February 22, 2016
Rehearing Denied:	April 21, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 30 2016	Application (16A11) to extend the time to file a petition for a writ of certiorari from July 20, 2016 to September 2, 2016, submitted to Justice Kagan.
Jul 01 2016	Application (16A11) granted by Justice Kagan extending the time to file until September 2, 2016.
Sep 02 2016	Petition for a writ of certiorari filed. (Response due October 7, 2016)
Sep 29 2016	Order extending time to file response to petition to and including November 7, 2016.
Oct 05 2016	Brief of respondents Agrowstar LLC, et al. in support filed.
Oct 07 2016	Brief of respondents American Farm Bureau Federation, et al. in support filed.
Oct 07 2016	Brief of respondents Ohio, et al. filed.
Oct 28 2016	Order further extending time to file response to petition to and including December 7, 2016.
Dec 07 2016	Brief of Federal Respondents in opposition filed.

Dec 20 2016	Reply of petitioner National Association of Manufacturers filed.
Dec 21 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 09 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED.
Jan 27 2017	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the petitioner filed.
Jan 31 2017	Motion to dispense with printing the joint appendix filed by petitioner National Association of Manufacturers.
Feb 01 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents AGrowStar, LLC, et al.
Feb 15 2017	The time to file petitioner's brief on the merits is extended to and including March 29, 2017.
Feb 17 2017	The time to file respondents' briefs on the merits is extended to and including May 31, 2017.
Feb 21 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Mar 06 2017	Motion to hold the briefing schedule in abeyance filed by federal respondents.
Mar 07 2017	The time to file petitioner's brief on the merits is further extended to and including April 13, 2017.
Mar 15 2017	Motion DISTRIBUTED for Conference of March 31, 2017.
Mar 15 2017	Opposition of respondents American Farm Bureau Federation, et al. to motion to hold the briefing schedule in abeyance filed. (Distributed)
Mar 15 2017	Response of respondents Ohio, et al. to motion to hold the briefing schedule in abeyance filed. (Distributed)
Mar 15 2017	Opposition of respondents Natural Resources Defense Council, et al. to motion to hold the briefing schedule in abeyance filed. (Distributed)
Mar 16 2017	Opposition of respondents Waterkeeper Alliance, et al. to motion to hold the

	briefing schedule in abeyance filed. (Distributed)
Mar 17 2017	Opposition of respondents New York, et al. to motion to hold the briefing schedule in abeyance filed. (Distributed)
Apr 03 2017	Motion to hold the briefing schedule in abeyance DENIED.
Apr 06 2017	The time to file petitioner's brief on the merits is further extended to and including April 27, 2017.
Apr 21 2017	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for respondents American Farm Bureau Federation, et al. filed.
Apr 26 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Federal Respondent.
Apr 26 2017	Brief of respondents Agrowstar LLC, et al. in support filed.
Apr 27 2017	Brief of respondents Waterkeeper Alliance, Inc., et al. in support filed.
Apr 27 2017	Brief of respondent Utility Water Act Group in support filed.
Apr 27 2017	Brief of petitioner National Association of Manufacturers filed.
Apr 27 2017	Brief of respondents Ohio, et al. in support filed.
Apr 27 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents Ohio, et al
May 03 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for intervenors-respondents New York, et al.
May 04 2017	Brief amici curiae of The Chamber of Commerce of the United States of America, et al. filed.
May 05 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents Waterkeeper Alliance, et al.
May 10 2017	The time to file respondents' briefs on the merits is extended to and including July 28, 2017.

Jun 26 2017	Motion for divided argument filed by respondents Ohio, et al.
Jul 19 2017	SET FOR ARGUMENT on Wednesday, October 11, 2017.
Jul 28 2017	Brief of respondents Department of Defense, et al. filed.
Jul 28 2017	Brief of respondents Natural Resources Defense Council, et al. filed.
Aug 01 2017	Record requested from the U.S.C.A. 6th Circuit.
Aug 03 2017	Record received from the U.S.C.A. 6th Circuit is electronic.
Aug 03 2017	Application (17A146) to extend the time to file reply briefs on the merits from August 28, 2017 to September 11, 2017, submitted to Justice Kagan.
Aug 07 2017	Application (17A146) granted by Justice Kagan extending the time to file reply briefs on the merits until September 11, 2017.
Aug 09 2017	CIRCULATED
Aug 25 2017	Motion for divided argument filed by respondents Ohio, et al. in support of petitioner GRANTED.
Sep 08 2017	Reply of respondents State Respondents Ohio, et al. in support of petitioner filed. (Distributed)
Sep 11 2017	Reply of respondent Utility Water Act Group in support of petitioner filed. (Distributed)
Sep 11 2017	Reply of respondents Waterkeeper Alliance, Inc., et al. in support of petitioner filed. (Distributed)
Sep 11 2017	Reply of petitioner National Association of Manufacturers filed. (Distributed)
Oct 11 2017	Argued. For petitioner: Timothy S. Bishop, Chicago, Ill. For respondents Ohio, et al. in support of petitioner: Eric E. Murphy, State Solicitor for Ohio, Columbus, Ohio. For respondents: Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Nov 17 2017	Letter of petitioner National Association of Manufacturers filed. (Distributed) **Main Document**

Nov 22 2017	Letter of respondents Department of Defense, et al. filed. (Distributed) **Main Document**
Jan 22 2018	Judgment REVERSED and case REMANDED. Sotomayor, J., delivered the **opinion** for a unanimous Court.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Timothy S. Bishop Counsel of Record	Mayer Brown LLP 71 South Wacker Drive Chicago, IL 60606 tbishop@mayerbrown.com	312-782-0600
Party name: National Association of Manufacturers		
Attorneys for Respondents		
Andrew D. Bing Counsel of Record	Deputy Solicitor General The Capitol Albany, NY 12224-0341 Andrew.Bing@ag.ny.gov	(518) 776-2050
Party name: New York, et al.		
Kristy A. Niehaus Bulleit Counsel of Record	Hunton & Williams, LLP 2200 Pennsylvania Ave., N.W. Washington, DC 20037 kbulleit@hunton.com	202-955-1500
Party name: Utility Water Act Group		
Kristy A.N. Bulleit Counsel of Record	Hunton & Williams LLP 1900 K Street, N.W. Washington, DC 20006	(202) 955-1547
Party name: Utility Water Act Group		
Eric F. Citron Counsel of Record	Goldstein & Russell, P.C. 7475 Wisconsin Ave., Suite 850 Bethesda, MD 20814 ec@goldsteinrussell.com	(202) 362-0636
Party name: Natural Resources Defense Council, et al.		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: Department of Defense, et al.

M. Reed Hopper Counsel of Record	Pacific Legal Foundation 930 G Street Sacramento, CA 95814 mrh@pacificlegal.org	(916) 419-7111

Party name: Agrowstar LLC, et al.

Allison M. LaPlante Counsel of Record	Lewis & Clark Law School, Earthrise Law Center 10015 S.W. Terwilliger Boulevard Portland, OR 97219 laplante@lclark.edu	(503)-768-6894

Party name: Waterkeeper Alliance, Inc., et al.

Allison Michelle LaPlante Counsel of Record	Earthrise Law Center, Lewis & Clark Law School 10015 S.W. Terwilliger Blvd. Portland, OR 97219 laplante@lclark.edu	(503)-768-6894

Party name: Waterkeeper Alliance, Inc., et al.

Eric E. Murphy Counsel of Record	Office of the Attorney General 30 East Broad Street, 17th Floor Columbus, OH 43215 eric.murphy@ohioattorneygeneral.gov	(614)-466-8980

Party name: State Respondents Ohio, et al. in support of petitioner

Ellen Steen Counsel of Record	American Farm Bureau Federation 600 Maryland Ave., SW, Suite 1000W Washington, DC 20024 ellens@fb.org	(202) 406-3616

Party name: American Farm Bureau Federation, et al.

Other

William S. Consovoy	Consovoy McCarthy Park PLLC 3033 Wilson Boulevard, Suite 700 Arlington , VA 22201 will@consovoymccarthy.com	(703) 243-9423

Party name: The Chamber of Commerce of the United States of America, et al.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
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No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD CLAMAGE
JED GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

In June 2015, respondent agencies promulgated a final rule defining the term "the waters of the United States" and hence the scope of Clean Water Act jurisdiction. The National Association of Manufacturers challenged that rule in district court under the Administrative Procedure Act. State, municipal, industry, and environmental challengers likewise filed APA suits, but in addition filed protective petitions for review in the courts of appeals, citing uncertainty about whether the rule challenge falls under the CWA's judicial review provision, 33 U.S.C. § 1369(b)(1).

The petitions for review were consolidated in the Sixth Circuit. The NAM intervened as respondent in the Sixth Circuit and moved to dismiss the petitions for want of jurisdiction. After full briefing and argument, the Sixth Circuit held that it, not the district courts, has jurisdiction to decide challenges to the rule. But only one judge actually believed that to be the correct outcome. Although two panel members concluded that § 1369(b)(1) *precludes* jurisdiction, one of them reasoned that he was bound by "incorrect" circuit precedent to take jurisdiction under § 1369(b)(1)(F), which requires that agency actions "in issuing or denying any permit under" § 1342 be reviewed by the court of appeals.

This recurring jurisdictional issue has divided the circuits, wasted judicial and party resources, and delayed the resolution of important rule challenges.

The question presented is whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.

PARTIES TO THE PROCEEDINGS BELOW

After the Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the Sixth Circuit (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)), the Sixth Circuit permitted petitioner here, the National Association of Manufacturers, to intervene as a respondent. Order, No. 15-3751 cons. (Sept. 16, 2015).

Respondents below—the federal agency respondents here—are the U.S. Environmental Protection Agency; Regina McCarthy, in her official capacity as EPA administrator; the U.S. Army Corps of Engineers; Lieutenant General Todd T. Semonite, in his official capacity as the Corps' Chief of Engineers and Commanding General;[1] Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army; and Eric Fanning, in his official capacity as Secretary of the Army.[2]

State intervenor-respondents below and respondents here are the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

Over 100 other parties filed 22 petitions for review below, and intervened in other petitions, and many of those petitioners moved to dismiss their own and other petitions for review for want of jurisdiction. These petitioners below, respondents here, are as follows:

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[1] Lt. General Semonite succeeded Lt. General Thomas P. Bostick in this capacity on May 19, 2016.

[2] Secretary Fanning succeeded John M. McHugh in this capacity on May 17, 2016.

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, New Mexico State Engineer.

No. 15-3837: Waterkeeper Alliance; Center for Biological Diversity; Center for Food Safety; Humboldt Baykeeper; Russian Riverkeeper; Monterey Coastkeeper; Upper Missouri Waterkeeper, Inc.; Snake River Waterkeeper, Inc.; Turtle Island Restoration Network, Inc.

No. 15-3839: Puget SoundKeeper; Sierra Club.

No. 15-3850: American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association;

Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc., and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

CORPORATE DISCLOSURE STATEMENT

Petitioner National Association of Manufacturers is a not-for-profit public advocacy group. It has no parent corporation and does not issue stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner National Association of Manufacturers respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-47a) is reported at 817 F.3d 261. The court of appeals' denial of rehearing en banc, which is unreported, is reproduced at App., *infra*, 51a-52a.

JURISDICTION

The separate judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of jurisdiction was entered on February 22, 2016. App., *infra*, 48a-50a. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. On July 1, 2016, Justice Kagan extended the time to file this petition to September 2, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), are set forth at App., *infra*, 53a-54a.

STATEMENT

The Clean Water Act ("CWA" or "Act") defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). In June 2015, the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") promulgated a final rule that significantly revised the scope of federal jurisdiction under the Act by redefining the term "waters of the United States." *Clean Water Rule:*

Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (the "WOTUS Rule" or "Rule").

The National Association of Manufacturers ("the NAM") is among scores of public and private plaintiffs—States, municipalities, and industry and environmental groups—that have challenged the WOTUS Rule. In the fifteen months since the new Rule became final no brief on the merits has yet been filed in any of these cases. Briefing on the merits in the Sixth Circuit is not due to be completed until mid-February 2017.

This bottleneck is due to an esoteric and wasteful debate over *where* the challenges to the Rule belong. The crux of the problem is the judicial review provision of the Clean Water Act, 33 U.S.C. § 1369(b). That provision funnels review of certain types of agency action directly to courts of appeals, leaving other challenges to be brought in the district courts under the Administrative Procedure Act. What should be a straightforward gatekeeping provision has in this and other cases generated widespread judicial disagreement, caused needless delay, and wasted valuable resources for no substantive purpose.

In particular, courts have disagreed over the interpretation of two categories of agency action that are specified in Section 1369(b) to trigger original circuit court review: actions "approving or promulgating any effluent limitation or other limitation" under certain provisions of the CWA, and actions "issuing or denying any permit" under the Act's National Pollutant Discharge Elimination System. *Id.* § 1369(b)(1)(E), (F). Virtually all district and circuit courts agree that the WOTUS Rule does not fall into either of those categories if the statutory words are given their plain meaning. However, courts have

divided over whether this Court's decisions in *E.I. du Pont de Nemours Co.* v. *Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980)—and lower courts' conflicting glosses on those decisions—require a looser interpretation.

The decision here, in which the Sixth Circuit split 1-1-1 over Section 1369(b)'s applicability, exemplifies this disarray. The panel produced three separate and incommensurate opinions addressing whether it has jurisdiction to consider the rule challenges. And the judge who cast the deciding vote in favor of court of appeals jurisdiction did so *not* because he thought that result was a *correct* application of the statute, but because he felt himself bound by a circuit precedent that he deemed wrongly decided and that conflicts with decisions in other courts of appeals. No challenge to agency action—let alone agency action as consequential as the WOTUS Rule, which brings vast areas of the Nation under federal jurisdiction as "waters of the United States"—should be left to rest on such a precarious foundation.

The NAM has consistently argued that the WOTUS Rule does not fall under any Section 1369(b)(1) category and that jurisdiction over these cases therefore belongs in the district court. Its still-pending complaint filed in the Southern District of Texas, joined by over a dozen co-plaintiffs, argues that Section 1369(b) does not provide any basis for circuit court jurisdiction. See *Am. Farm Bureau Fed'n, et al.* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.), Dkt. 1 at ¶¶ 6-9. And while the NAM's co-plaintiffs filed "protective" petitions for review in the Sixth Circuit to prevent their challenges from becoming untimely if the jurisdictional question were resolved in favor of circuit court review, the NAM did not do so. Instead, it intervened as a respondent in 11 of the 22 petitions

(which have all been consolidated) and moved to dismiss for lack of jurisdiction—precisely in order to ensure its standing to seek further review of the jurisdictional question before this Court.

The question presented here not only dogs the pending challenges to the WOTUS Rule, but also has confused and delayed prior rule challenges and certainly will disrupt future rule challenges. That is an intolerable situation. "[J]urisdictional rules should be clear." *Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002). This Court's review is urgently required to determine where jurisdiction lies for the WOTUS Rule challenges, resolve the circuit split on Section 1369(b)'s meaning, and guide the federal courts in their future application of that provision.

A. The Clean Water Act

The Clean Water Act "prohibits 'the discharge of any pollutant' without a permit into 'navigable waters,' which it defines, in turn, as 'the waters of the United States.'" *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016) (citing 33 U.S.C. §§ 1311(a), 1362(7), (12)). Obtaining a permit is costly, and the penalties for discharging without one are substantial. *Id.* at 1812. The scope of "the waters of the United States" is therefore a matter of exceptional importance for landowners, industry and environmental groups, and government officials.

In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985), this Court concluded that the agencies permissibly interpreted "waters of the United States" to encompass wetlands that actually abutted traditional navigable waters. In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), it struck down

the agencies' "Migratory Bird Rule," which purported to extend agency jurisdiction to any waters that are or might be used as habitat for migratory birds, no matter how isolated or remote from navigable waters. And in *Rapanos* v. *United States*, 547 U.S. 715 (2006), the Court reversed the agencies' determination that they had jurisdiction over wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters," which swept in "virtually any parcel of land containing a channel or conduit * * * through which rainwater or drainage may occasionally or intermittently flow." *Id.* at 722, 729 (plurality opinion).

The WOTUS Rule purports to clarify the definition of "waters of the United States" within the meaning of the CWA and *Rapanos*, *SWANCC*, and *Riverside Bayview*. 80 Fed. Reg. at 37,054.

B. The WOTUS Rule

The WOTUS Rule separates waters into three jurisdictional groups: waters that are categorically jurisdictional, waters that require a case-specific significant nexus evaluation to determine if they are jurisdictional, and waters that are categorically excluded from jurisdiction.

In the first group are waters that are categorically jurisdictional: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of any water deemed to be a "water of the United States," (5) certain tributaries, and (6) certain waters that are "adjacent" to the foregoing five categories of waters. 33 C.F.R. § 328.3(a).

In the second group are waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional. 80 Fed. Reg. at 37,073. Waters that are subject to jurisdiction based on a case-

specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea; or (B) waters, any part of which are within 4,000 feet of the ordinary high water mark of any of those jurisdictional waters, any impoundment of those jurisdictional waters, or any covered tributary. 33 C.F.R. § 328.3(a)(8).

In the third group are waters always excluded from jurisdiction. These include: swimming pools, puddles. ornamental waters, prior converted cropland, waste treatment systems, certain kinds of drainage ditches, farm and stock watering ponds, settling basins, water-filled depressions incidental to mining or construction activity, subsurface drainage systems, and certain wastewater recycling structures. 33 C.F.R. § 328.3(b).

The NAM and its co-plaintiffs in the Southern District of Texas will show (once this case reaches the merits stage) that the WOTUS Rule violates this Court's precedents, is deeply flawed both in substance and procedurally, and consequently violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A)-(D). But to this point, uncertainty over the meaning of Section 1369(b) has meant that the NAM has spent the past 15 months since promulgation of the Rule litigating the issue of where jurisdiction over the merits belongs, in multiple forums.

C. The Clean Water Act's Judicial Review Provisions

The CWA grants the courts of appeals original jurisdiction to hear challenges to seven specified categories of final agency actions (App., *infra*, 53a-54a)—among them, insofar as relevant here, actions

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title * * *.

33 U.S.C. § 1369(b)(1). This jurisdiction is not only original, but exclusive. *Decker* v. *Nw. Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013).

Section 1369(b) very clearly "extends only to *certain* suits challenging *some* agency actions." *Decker*, 133 S. Ct. at 1334 (emphasis added). Challenges to agency rules not specified in Section 1369(b) proceed under Sections 702 and 704 of the APA, which provide that "[a] person suffering legal wrong" or "adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Thus, litigants whose claims do not fall within Section 1369(b)(1) may invoke a cause of action in district court under the APA and 28 U.S.C. § 1331. That Section 1369(b)(1) is not intended to be all-encompassing is confirmed by Section 1365(e), which preserves statutory and common law rights to seek relief against the Administrator (such as those available under the APA).

In promulgating the WOTUS Rule the agencies conceded that while Section 1369(b)(1) "provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator," courts "have reached different conclusions on the types of actions that fall within" that provision. 80 Fed. Reg. at 37,104.

D. Litigation Challenging The New Rule

Scores of state, municipal, industry, and environmental plaintiffs filed suits challenging the WOTUS

Rule in district courts around the country,[1] including the NAM, which filed suit along with other industry groups in the Southern District of Texas.[2]

The Judicial Panel on Multidistrict Litigation denied the federal government's request to consolidate the district court actions and to transfer them to the District Court for the District of Columbia. See *In re: Clean Water Rule*, MDL No. 2663, Dkt. 163 (JPML Oct. 13, 2015). The Judicial Panel held that transfer was inappropriate under 28 U.S.C. § 1407 because the complaints turn on issues of law, and held that "different jurisdictional rulings by the involved courts" also augured against consolidation. *Id.* at 2.

Reflecting uncertainty surrounding the scope of Section 1369(b), many plaintiffs who filed district court actions (but not the NAM) also filed "protective" petitions for review in various courts of appeals.[3] Those petitions for review were consolidated and transferred

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[1] Those actions are *North Dakota* v. *EPA*, No. 3:15-cv-59 (D.N.D.); *Murray Energy Corp.* v. *EPA*, No. 1:15-cv-110 (N.D. W. Va.); *Ohio* v. *EPA*, 2:15-cv-2467 (S.D. Ohio); *Texas* v. *EPA*, No. 3:15-cv-162 (S.D. Tex.); *Georgia* v. *McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *Oklahoma ex rel. Pruitt* v. *EPA*, No. 4:15-cv-381 (N.D. Okla.); *Chamber of Commerce* v. *EPA*, No. 4:15-cv-386 (N.D. Okla.); *Southeastern Legal Foundation* v. *EPA*, No. 1:15-cv-2488-TCB (N.D. Ga.); *Washington Cattlemen's Association* v. *EPA*, No. 0:15-cv-3058 (D. Minn.); *Puget Soundkeeper Alliance* v. *McCarthy*, No. 2:15-cv-1342 (W.D. Wash.); *Waterkeeper Alliance* v. *EPA*, No. 3:15-cv-3927 (N.D. Cal.); *Natural Resources Defense Council* v. *EPA*, No. 1:15-cv-1324 (D.D.C.); and *Arizona Mining Ass'n* v. *EPA*, No. 2:15-cv-1752 (D. Az.).

[2] *Am. Farm Bureau Fed'n, et al.* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.).

[3] The 22 petitions for review and more than 100 petitioners are identified in the Parties to the Proceeding Below section, *supra*, pp. ii-v.

to the Sixth Circuit pursuant to 28 U.S.C. § 2112(a). Consolidation Order, MCP No. 135 (JPML July 28, 2015).

The agencies moved to stay or dismiss cases in the district courts in favor of the circuit court litigation. All of the cases became ensnarled in the jurisdictional dispute, halting any progress towards the merits.

1. Confusion in the district courts

In August 2015, the U.S. District Court for the Northern District of West Virginia held that the Sixth Circuit had exclusive jurisdiction over Rule challenges. *Murray Energy Corp.* v. *EPA*, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015). The U.S. District Court for the Southern District of Georgia reached the same conclusion. *Georgia* v. *McCarthy*, 2015 WL 5092568, at *3 (S.D. Ga. Aug. 27, 2015).

But the very same day as *McCarthy*, the U.S. District Court for the District of North Dakota affirmed its own jurisdiction, holding that Section 1369(b) does not apply. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). The court observed that "[i]f the exceptionally expansive view" of that provision "advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act." *Id.* at 1053. The *North Dakota* court denied the agencies' motion to dismiss and preliminarily enjoined the operation of the Rule.[4]

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[4] See *North Dakota* v. *EPA*, 3:15-cv-59, Dkt. 79 (D.N.D. Sept. 4, 2015) (limiting the injunction to the States that were party to the challenge). After the Sixth Circuit ruled it had jurisdiction the North Dakota court denied the United States' renewed motion to dismiss and to dissolve the injunction and stayed the case "pending further decision by the Courts of Appeals or Supreme Court." *Id.*, Order, Dkt. 156 (May 24, 2016).

2. The Sixth Circuit refuses to dismiss the petitions for review

The NAM, which had not filed a protective petition for review, successfully moved to intervene as a respondent in the Sixth Circuit. Dkt. 8, No. 15-3751 cons. (6th Cir. Sept. 16, 2015). The NAM then moved to dismiss the petitions for review for want of jurisdiction. Dkt. 39, No. 15-3751 cons. (6th Cir. Oct. 2, 2015), as did many of the parties that had filed protective petitions for review.

The Sixth Circuit ordered full briefing and argument on jurisdiction. On October 9, acknowledging the "still open question whether * * * this litigation is properly pursued in this court or in the district courts," the Sixth Circuit issued a nationwide stay of the Rule to "temporarily silenc[e] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing." *In re EPA*, 803 F.3d 804, 806, 808 (6th Cir. 2015). Judge Keith dissented, arguing that a stay was premature so long as the court's jurisdiction remained "in doubt." *Id.* at 809 (Keith, J., dissenting).

On February 22, 2016, the Sixth Circuit concluded, in an unusually fractured decision, that it and not the district courts had jurisdiction to hear the Rule challenges. The court of appeals' 1-1-1 decision produced its own "whirlwind of confusion." 803 F.3d at 808. Indeed, the only thing the panel could agree on was that subsections (E) and (F) were the "only two provisions of § 1369(b)(1)" that "potentially apply." App., *infra*, 8a. On all other issues the panel splintered.

a. Judge McKeague's opinion. Judge McKeague admitted that the government's textual arguments as to subsection (E) were "not compelling." App., *infra*, 9a.

"[T]he Rule's clarified definition," he wrote, does not "approve or promulgate *any* limitation that imposes *ipso facto* any restriction or requirement on point source operators or permit issuers." *Ibid.* (emphasis added). "Rather," it is "a definitional rule that, operating in conjunction with other regulations, will result in imposition of such limitations." *Ibid.*

Judge McKeague nevertheless concluded that jurisdiction lies in the court of appeals under subsection (E)—not because the statutory text requires it, but because this Court's decision in *E.I. du Pont de Nemours Co.* v. *Train* does so. Judge McKeague conceded that the *du Pont* case "can be read in more ways than one." App., *infra*, 10a. But he believed that *du Pont* "eschewed" a "literal reading" of Section 1369(b)(1) in favor of a "more generou[s]" interpretation than the statutory "language would indicate," and that this interpretation encompasses the WOTUS Rule because the Rule's "practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." App., *infra*, 10a, 13a, 17a.

Turning to Subsection (F), Judge McKeague recognized that the Rule does not "issue" or "deny" any permits. But he concluded that Subsection (F) ought not be given "a strict literal application" either. App., *infra*, 17a. In support, Judge McKeague cited this Court's opinion in *Crown Simpson Pulp Co.* v. *Costle* and the Sixth Circuit's decision in *National Cotton Council of America* v. *EPA*, 553 F.3d 927 (6th Cir. 2009). He reasoned that those decisions together authorize direct review in the circuit courts of any regulation that merely, in some indirect way, "*affects* permitting requirements." App., *infra*, 19a (emphasis added).

b. Judge Griffin's begrudging concurrence. Judge Griffin concurred in the judgment only. Like Judge McKeague, he concluded that the "plain text" of subsection (E) does not govern the petitions for review because the WOTUS Rule is not an "effluent limitation or other limitation." App., *infra*, 30a-31a. But unlike Judge McKeague, Judge Griffin refused to read *du Pont* as "shoehorning an exercise in jurisdictional line-drawing into subsection (E)'s 'other limitation' provision," and hence found no jurisdiction under Subsection (E). App., *infra*, 35a.

Canvassing the text and Supreme Court precedents, Judge Griffin also thought it plain that Subsection (F) "simply does not apply here." App., *infra*, 40a. He concurred in the judgment only because, in his view, the Sixth Circuit's earlier decision in "*National Cotton* dictates [the] conclusion" that Subsection (F) encompasses the WOTUS Rule—a conclusion he criticized because it means that subsection (F)'s "jurisdictional reach * * * has no end." App., *infra*, 42a. Judge Griffin explained that "while I agree" with Judge McKeague "that *National Cotton* controls this court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking." App., *infra*, 38a-39a.

c. Judge Keith's dissent. Judge Keith dissented. He joined Judge Griffin in holding Subsection (E) inapplicable. App., *infra*, 45a. But he concluded that "*National Cotton*'s holding is not as elastic as the concurrence suggests." App., *infra*, 47a. It does not authorize original subject-matter jurisdiction over "all rules '*relating*' to [permitting] procedures, such as the one at issue here," which "merely defines the scope of the term 'waters of the United States.'" App., *infra*, 46a. Even read most broadly, *National Cotton* interpreted Section 1369(b) to reach only those rules that

"'regulate' or 'govern' [permitting] procedure," which the WOTUS Rule does not. *Ibid.* Observing that the Eleventh Circuit had rejected *National Cotton*'s reasoning in *Friends of the Everglades* v. *EPA*, 699 F.3d 1280 (11th Cir. 2012), Judge Keith saw no need to read *National Cotton* "in a way that expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion." App., *infra*, 46a-47a. He would have granted the motions to dismiss and sent the parties to the district courts for initial review.

The Sixth Circuit issued a separate judgment denying the motions to dismiss. App., *infra*, 48a-50a.

The NAM and others petitioned the Sixth Circuit to rehear its jurisdictional ruling *en banc*. The court denied rehearing over the dissent of Judge Keith. App., *infra*, 51a-52a. Thereafter, the court set a briefing schedule on a motion relating to the content of the administrative record, followed by the merits. Merits briefing will not be completed until mid-February 2017—*twenty months* after the EPA and the Corps first promulgated the Clean Water Rule. Case Management Order No. 2, Dkt. 99 (June 14, 2016).

E. The Aftermath Of The Sixth Circuit's Decision

Following the Sixth Circuit's fractured decision, the U.S. District Court for the Northern District of Oklahoma declined jurisdiction. *Oklahoma ex rel. Pruitt* v. *EPA*, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016). The government moved to dismiss or stay other cases, including in the Southern District of Texas, where the NAM's case is pending. The NAM opposed the government's motion, which remains pending. *Am. Farm Bureau Fed'n, et al.* v. *EPA*, 3:15-cv-165 (S.D. Tex.), Dkt. 50.

In August, the Eleventh Circuit abstained under *Colorado River* from deciding the appeal of the denial of a preliminary injunction for lack of jurisdiction in *Georgia* v. *McCarthy*, pending the Sixth Circuit's decision on the merits. *Georgia* v. *McCarthy*, 2016 WL 4363130 (11th Cir. Aug. 16, 2016).[5] Pointedly, the Eleventh Circuit did not endorse the Sixth Circuit's jurisdictional analysis. Nor did it order the district court to dismiss the case for lack of jurisdiction. Rather, relying on "[c]onsiderations of wise judicial administration," the court determined to "stay [its] hand" pending "further developments." *Id.* at *2.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Erroneously Took Jurisdiction Under Section 1369(b), In Conflict With Decisions Of Other Circuits.

"Section 1369(b) extends only to certain suits challenging some agency actions." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). It does not extend to suits challenging the WOTUS Rule. A majority of the panel understood that fact. App., *infra*, 27a (Griffin, J.), 45a (Keith, J.). Judge Griffin nevertheless voted with Judge McKeague to exercise jurisdiction under Section 1369(b)(1)(F), believing that he was bound by the Sixth Circuit's "incorrect" decision in *National Cotton*. App, *infra*, 44a. The panel's decision to exercise jurisdiction was in error and in conflict with decisions of other circuits.

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[5] The NAM and its co-plaintiffs filed an *amicus* brief in the Eleventh Circuit in *McCarthy* urging reversal of the district court's decision declining jurisdiction. The NAM and its co-plaintiffs likewise filed an *amicus* brief in the Tenth Circuit in the *Pruitt* case urging reversal of the dismissal. The *Pruitt* appeal has not yet been decided.

A. The Sixth Circuit Lacks Jurisdiction Under Section 1369(b).

1. Section 1369(b)(1)(F) does not authorize the Sixth Circuit's review of the Rule. It grants courts of appeals original jurisdiction to "[r]eview * * * the Administrator's action * * * in issuing or denying any permit under section 1342." There are plenty of examples in which the EPA Administrator *actually* issues or denies a Section 1342 permit; those EPA actions are properly challenged in the courts of appeals.[6]

The WOTUS Rule, by contrast, does not issue or deny a permit. EPA Administrator Gina McCarthy admitted as much: "the Clean Water Rule is a jurisdictional rule. It doesn't result in automatic permit decisions." *The Fiscal Year 2016 EPA Budget: Joint Hearing Before the Subcomm. on Energy & Power & the Subcomm. on Environment & Economy of the House Comm. on Energy & Commerce*, 114th Cong. 70 (Feb. 25, 2015). Judge Griffin therefore was correct in concluding that "[o]n its face, subsection (F) clearly does not apply," because the Rule "neither issues nor denies a permit" under Section 1342. App., *infra*, 39a. "[T]his should end the analysis." *Ibid.*

Judge McKeague agreed that this reading is "consonant with the plain language" of the statute.

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[6] See, *e.g.*, *Nat. Res. Def. Council* v. *EPA*, 808 F.3d 556, 562 & n.4 (2d Cir. 2015) (challenging grant of Section 1342 permit to vessels); *Alaska Eskimo Whaling Comm'n* v. *EPA*, 791 F.3d 1088, 1090-1091 (9th Cir. 2015) (challenging grant of Section 1342 permit to oil and gas exploration facilities); *Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9, 11, 20 (1st Cir. 2012) (challenging grant of Section 1342 permit to sewage treatment plant); *Alton Box Bd. Co.* v. *EPA*, 592 F.2d 395, 396 (7th Cir. 1979) (challenging denial of Section 1342 permit to mill).

App., *infra*, 23a-24a. But he chose not to apply that plain language on the ground that *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), "opened the door to constructions other than a strict literal application." App., *infra*, 17a.

To put it plainly, Judge McKeague misread *Crown Simpson*. In that case, EPA vetoed Section 1342 permits that a California agency had issued to pulp mills after EPA had delegated permitting authority to the State. 445 U.S. at 194-195 & n.3. This Court held that the Ninth Circuit had jurisdiction under Section 1369(b)(1)(F) to review EPA's vetoes because "EPA's veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program" and had the "precise effect" of denying the permits. *Id.* at 196.

As Judge Griffin explained, *Crown Simpson*'s "'facts * * * make clear that the Court understood functional similarity in a narrow sense.'" App., *infra*, 40a. EPA effectively had denied Crown Simpson's Section 1342 permit applications in the most literal sense. Judge McKeague lost sight of those facts when he read *Crown Simpson* to allow courts of appeals to review any CWA regulation "so long as it affects permitting requirements." App., *infra*, 19a.

Congress could have written paragraph (F) to apply to EPA actions "affecting when permits are or are not required under Section 1342." But Judge McKeague's approach cannot be squared with the statute that Congress *actually* wrote, which applies to agency actions that *themselves* amount to "issuing or denying any permit under section 1342." As Judges Keith and Griffin recognized, it is difficult to imagine any case in which Judge McKeague's expansive re-drafting of paragraph (F) would not confer jurisdiction.

See App., *infra*, 42a (it means subsection (F)'s "jurisdictional reach * * * has no end") (Griffin, J.); App., *infra*, 47a (it "expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion") (Keith, J.).

Judge Keith explained in his dissent why Judge Griffin erred in nevertheless voting to exercise jurisdiction under Section 1369(b)(1)(F) on the ground that *National Cotton* required it. But Judge Griffin's belief that his vote was forced by the incorrect decision in *National Cotton* is of no moment here. Unbound by *National Cotton*, this Court is free to read the statute correctly.

2. A majority of the panel properly concluded that Section 1369(b)(1)(E) does not confer jurisdiction. App., *infra*, 29a-38a (Griffin, J.), 45a (Keith, J.); see also Gov't Opp. to Rh'g Pets. at 22 n.7, Dkt. 89 (Apr. 1, 2016) (conceding that the Sixth Circuit is not exercising jurisdiction under paragraph (E)). The agencies' contention that Section 1369(b)(1)(E) confers jurisdiction is mistaken.

Paragraph (E) grants jurisdiction to courts of appeals to review "the Administrator's action * * * in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." It is undisputed that the Rule is *not* an "effluent limitation," which is a "restriction * * * on quantities, rates, and concentrations of chemical" or other constituents that are discharged into navigable waters. 33 U.S.C. § 1362(11); see App., *infra*, 8a-9a. The Rule also is not an "other limitation under section 1311, 1312, 1316, or 1345," for three independent reasons.

First, the Rule is not a "limitation" in any ordinary sense of that word. It does not directly restrict the use

to which property owners put their land. It purports only to define the phrase "waters of the United States," which describes the waters to which *other* CWA sections may apply. As Judge Griffin put it, the Rule "is not self-executing" but merely "operates in conjunction with other sections scattered throughout the Act to define when [the Act's other] restrictions * * * apply." App., *infra*, 31a; see also *id.* at 9a ("[T]he Rule's clarified definition is not self-executing"; only "operating in conjunction with other regulations [will it] result in imposition of such limitations") (McKeague, J.).

Second, the Rule is not an "other" limitation. The *ejusdem generis* canon requires reading a general term following a specific term as "embrac[ing] only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). Application of the canon thus requires reading "other limitation" as embracing an object similar to an "effluent limitation." Effluent limitations are not just *any* limitation; rather, they "dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst.* v. *EPA*, 890 F.2d 869, 876 (7th Cir. 1989). The Rule, which is a regulatory definition of "waters of the United States," is not even remotely similar in nature to an effluent limitation.

Third, the Rule is not an other limitation "under section 1311, 1312, 1316, or 1345." Each of those sections provides for the issuance of effluent limitations or effluent limitation-like rules. Section 1311 governs "effluent limitations." Section 1312 governs "water quality related effluent limitations," which are additional effluent limitations that may be imposed where other limitations fail to achieve water quality standards. Section 1316 requires establishment of

technology-based effluent controls for new dischargers. And Section 1345 restricts the discharge of sewage sludge. It would be a mistake to think of the agencies' definition of "waters of the United States" as a limitation at all; it would be downright absurd to say that, *as* a limitation, it has a purpose similar in nature to an effluent limitation describing the technical measures of pollutants allowed under a permit—much less that it was promulgated under any of the specifically identified statutory provisions. See App., *infra*, 30a-31a (Griffin, J.) (the Rule "does not emanate from these sections" and is not "related to the statutory boundaries set forth in [them]"); *Friends of the Everglades*, 699 F.3d at 1286 ("[E]ven if the water-transfer rule could be classified as a limitation, it was not promulgated under section 1311, 1312, 1316, or 1345").

3. There is another reason to reject interpreting paragraphs (E) or (F) as limitless grants of original jurisdiction to the courts of appeals over all agency rulemaking that touches on CWA permitting: the *expressio unius est exclusio alterius* canon, which provides that the expression of one thing implies the exclusion of another. Section 1369(b) meticulously catalogues seven categories of agency action subject to original review in the courts of appeals. Congress's careful selection "justif[ies] the inference" that a general grant to courts of appeals of jurisdiction over all CWA rules was "excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions [in Section 1369(b)], while meaning to imply a more general and broad coverage than the statutes designated." *Long-*

view Fibre Co. v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

That conclusion takes on special force when Section 1369(b) is considered alongside the much broader grant of jurisdiction to courts of appeals in the Clean Air Act. That statute provides for original jurisdiction in the courts of appeals over challenges not only to particular agency actions, but also to "any other nationally applicable regulations promulgated, or final action taken, by the Administrator" under the Act. 42 U.S.C. § 7607(b)(1). That language shows that Congress knows how to "ma[ke] express provisions" for expansive original jurisdiction in the courts of appeals when it wants to and that its "omission of the same [language]" from Section 1369(b)(1) "was purposeful." *Zadvydas* v. *Davis*, 533 U.S. 678, 708 (2001). In short, the panel plainly erred in exercising jurisdiction under Section 1369(b).

B. The Panel's Ruling Conflicts With Decisions Of Other Courts Of Appeals.

The panel's erroneous decision deepens a conflict among the circuits. In their preamble to the Rule the agencies acknowledged that "courts have reached different conclusions on the types of actions that fall within section [1369(b)]." 80 Fed. Reg. at 37,104; see also Allison LaPlante *et al.*, *On Judicial Review Under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center: *What We Know Now and What We Have Yet to Find Out*, 43 ENVTL. L. 767, 767 (2013) (observing that decisions interpreting Section 1369(b) are "confusing and messy" because the "Circuits are split"). The panel's ruling—itself hopelessly fractured—cannot be reconciled with *Friends of the Everglades* v. *EPA*, 699 F.3d 1280 (11th Cir. 2012).

1. In *Friends of the Everglades*, the Eleventh Circuit held that it lacked original jurisdiction to review EPA's water transfer rule. 699 F.3d at 1283. That rule excludes from the CWA's prohibition of "any addition of any pollutant to navigable waters" without a Section 1342 permit an activity that "conveys or connects waters of the United States," provided the activity does not "subjec[t] the transferred water to intervening industrial, municipal, or commercial use." But it includes within the prohibition an activity in which "pollutants [are] introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i); see 33 U.S.C. § 1362(12).

EPA argued in *Friends* that Section 1369(b)(1)(F) provided jurisdiction because paragraph (F) "appl[ies] to any 'regulations relating to permitting itself" (699 F.3d at 1288)—the very argument that Judge McKeague accepted here. See App., *infra*, 19a. The Eleventh Circuit flatly rejected that contention because it is "contrary to the statutory text." 699 F.3d at 1288.

The Eleventh Circuit also declined to follow the Sixth Circuit's decision in *National Cotton*, explaining that *National Cotton* "provided no analysis" of Section 1369(b)(1)(F) and "cited two decisions of the Ninth Circuit that the Ninth Circuit had distinguished in *Northwest Environmental Advocates*" (a decision we discuss below). 699 F.3d at 1288. Here, Judge Griffin found the Eleventh Circuit's criticisms of *National Cotton* to "have merit," but concluded that he was nevertheless bound by *National Cotton* as prior Sixth Circuit precedent. App., *infra*, 43a. "But for *National Cotton*," he—and thus the panel—would have granted the motions to dismiss. *Id.* at 39a.

The WOTUS Rule purports to clarify the CWA's jurisdictional reach as defined by the statutory phrase

"waters of the United States" in 33 U.S.C. § 1362(7), which, the agencies say, "establishes where the Act's prohibitions and requirements apply." See App., *infra*, 32a. The water transfer rule at issue in *Friends of the Everglades*, in defining when a transfer of water through a point source is or is not an "addition of any pollutant" under Section 1362(12), likewise established circumstances in which "'the Act's prohibitions and requirements apply.'" There is no plausible argument that Section 1369(b) gave the court of appeals jurisdiction here but not in *Friends*.

The agencies mistakenly contend that the cases are distinguishable because the water transfer rule creates an "exemption." *E.g.*, U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 52 n.8 (asserting that *Friends* is "not on point" because it "considered *exemptions* from [CWA] requirements"). That is mere wordplay. Calling a rule an "exemption" is just another way of saying that a rule defines when the Act's requirements apply and when they do not. That is especially clear in *Friends*, where the rule on its face described water transfers that are included in the Section 1342 prohibition—transfers that involve the intervening use of the water or that themselves introduce pollutants to the water—as well as transfers that are excluded.

Against this backdrop, there is no doubt that if the JPML had consolidated the petitions for review of the WOTUS Rule in the Eleventh Circuit instead of the Sixth Circuit, the challenges would have been dismissed for want of jurisdiction under *Friends*.

2. The panel's ruling also is at odds with the Ninth Circuit's decision in *Northwest Environmental Advocates* v. *EPA*, 537 F.3d 1006 (9th Cir. 2008). The plaintiff in *Northwest Environmental Advocates* filed

an APA action in the district court challenging a regulation that exempted certain vessel discharges from Section 1342 permitting. EPA argued on appeal that the district court lacked jurisdiction because the challenge fell within Section 1369(b)'s grant of exclusive jurisdiction to the courts of appeals. The Ninth Circuit disagreed. *Id.* at 1015-1018.

The Ninth Circuit refused to "lightly hold that we have jurisdiction under section [1369(b)]." 537 F.3d at 1015. It "counseled against * * * expansive application" of that jurisdictional grant because "'no sensible person would speak with'" the degree of "'specificity and precision'" that Congress used in Section 1369(b) if an expansive application is what it intended. *Ibid.* The Ninth Circuit held that original court of appeals jurisdiction is proper under Subsection (E) only if a rule clearly imposes a limitation, or under Subsection (F) only if the "EPA actions [are] 'functionally similar' to the denial of permits." *Id.* at 1016 (quoting *Crown Simpson*, 445 U.S. at 196). And "the facts of [*Crown Simpson*] make clear that th[is] Court understood functional similarity in a narrow sense." *Ibid.* Because the exemption at issue involved neither the issuance or denial of a permit or a functionally similar action, nor the approval or promulgation of any effluent or other limitation, Section 1369(b) did not govern.

3. The panel's decision is also contrary to the North Dakota district court's decision that it—not courts of appeals—has jurisdiction to review the WOTUS Rule. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015). The district court favorably cited the Eleventh Circuit's decision in *Friends* and correctly held that the agencies' argument "run[s] precisely contrary to Congress' intent in drafting" Section 1369(b) narrowly. *Id.* at 1053. The district court reaffirmed that decision by refusing to dismiss the case

after the Sixth Circuit panel issued its decision. Order, Dkt. 156, No. 3:15-cv-59 (D.N.D. May 24, 2016).

As the agencies argued in opposing the challengers' petitions for en banc rehearing, achieving "uniformity among the circuits" is "the province of the Supreme Court." Gov't Opp. to Rh'g Pets. at 22. So it is. The Court should grant certiorari here to bring that uniformity.

II. The Question Presented Is Of Immense And Immediate Practical Importance.

A. Uncertainty Over The Meaning Of Section 1369(b) Causes Delay And Waste Of Judicial And Party Resources.

1. This Court has recognized that the manner of challenging federal environmental regulations is an issue of exceptional importance. See *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586 (1980) ("We granted certiorari * * * because of the importance of determining the locus of judicial review of the actions of EPA [under the Clean Air Act]"). The panel here acknowledged "the nationwide importance of the matter." Order at 2, Dkt. 78 (6th Cir. Mar. 16, 2016). So did EPA when it petitioned for certiorari from the Eleventh Circuit's decision in *Friends of the Everglades*. There, EPA urged this Court to grant certiorari on the Section 1369(b) issue because "the proper time and manner of judicial challenges to the Water Transfers Rule and similar NPDES-related regulations" "presents a question of exceptional importance" that "has significant consequences for the applicable statute of limitations and mode of litigation" and that has given rise to circuit "conflicts." U.S. Pet'n for Cert., No. 13-10, at 9 (U.S. 2013). Commentators agree. See LaPlante, *supra*, 43 ENVTL. L. at 772 ("[T]here is no denying that questions regarding

section [1369](b)(1)'s reach are important and need to be resolved by the High Court").

This Court has recognized time and again that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.* "Judicial resources too are at stake" because "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Ibid.* (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006)). "So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Ibid.*

Nowhere are these truths more apparent than with respect to Section 1369(b). Because of the great uncertainty in the case law, parties cannot know which court (or courts) will rule that it has power to decide a CWA rule challenge. As a result, challenges are routinely filed both in the district courts and in the courts of appeals—a wasteful practice that the agencies concede is appropriate "to preserve a forum for [challengers'] claims" "[g]iven uncertain jurisdiction." U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 24.[7] This uncertainty produces duplicative litigation, conflicting decisions on

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[7] The Seventh Circuit in *Roll Coater, Inc.* v. *Reilly*, 932 F.2d 668, 671 (7th Cir. 1991), warned that "careful counsel must respond to" the "uncertain opportunities for review" of CWA regulations by "filing buckshot petitions" both in the district court and court of appeals. That is precisely what challengers do. See, *e.g.*, *Friends of the Everglades*, 699 F.3d at 1283; *National Cotton*, 553 F.3d at 932; *Nw. Envtl. Advocates*, 537 F.3d at 1014.

jurisdiction, significant delay, and tremendous waste of judicial and party resources. It also leaves merits decisions vulnerable to appellate reversal on grounds other than the merits, creating additional uncertainty. And the problem is unavoidable because every federal court has an independent obligation to determine if it has subject-matter jurisdiction.

2. The challenges to this Rule are a case in point. The agencies admit that "there is no denying the importance of the Clean Water Rule." Gov't Opp. to Rh'g Pets. at 12. Because of the Rule's importance, State, municipal, industry, and environmental parties filed complaints in district courts and 22 petitions for review in the courts of appeals to guarantee that they preserved their challenges. See *supra*, p. 8.

Before the Sixth Circuit issued its decision, three district courts had ruled on jurisdiction, reaching conflicting determinations. *Supra*, p. 9. After the panel's ruling, a district court *sua sponte* dismissed an APA challenge for lack of jurisdiction, another denied the agencies' motion to dismiss, another has the agencies' motion under advisement, and still others have stayed the cases. *Supra*, p. 13. On appeal from a district court's denial of a preliminary injunction against the Rule for want of jurisdiction, the Eleventh Circuit abstained, holding the case in abeyance and ordering the district court to stay, not dismiss, APA proceedings. *Georgia* v. *McCarthy*, 2016 WL 4363130, at *3 (11th Cir. Aug. 16, 2016). And the Tenth Circuit is currently considering an appeal from the dismissal of an APA action for lack of jurisdiction. *Supra*, p. 14. This garbled state of affairs is intolerable.

For its part, the NAM has invested substantial time and money in the proceedings on jurisdiction—as have State, municipal, industry, and environmental

parties, the agencies, and the courts. Only now, long after the agencies promulgated the Rule, are the parties even beginning to brief the merits. And they are doing so before a court that they believe lacks jurisdiction—which puts a merits decision by a Sixth Circuit at risk upon further review.

3. Earlier challenges to EPA's water transfer rule provide another example. That rule was issued in 2008. *Friends of the Everglades*, 699 F.3d at 1284. Challenges were brought in the district courts and courts of appeals. The latter were consolidated in the Eleventh Circuit, which held it lacked original jurisdiction over the rule challenges. *Id.* at 1286. After the United States unsuccessfully sought certiorari to review the jurisdiction ruling (No. 13-10), litigation proceeded in the district court, which ruled on the merits in 2014—*six years* after the regulation was issued. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, 8 F. Supp. 3d 500, 516 (S.D.N.Y. 2014). The appeal from that decision remains pending today.

EPA stipulated that, in light of the Eleventh Circuit's decision, it is collaterally estopped from challenging the district court's jurisdiction in the Second Circuit. EPA Br. at 3-4 & n.2, Dkt. 210, No. 14-1823(L) (2d Cir. Sept. 11, 2014). That seems unlikely. But even if that proposition were correct, parties in the district court that did not participate in *Friends* may challenge an unfavorable ruling from the Second Circuit by arguing on petition for rehearing or certiorari that the district court lacked subject-matter jurisdiction—a non-waivable issue—and that the Second Circuit's decision therefore must be vacated. Cf. *Ford Motor Co.* v. *United States*, 134 S. Ct. 510, 510 (2013) (per curiam) (granting certiorari, vacating, and remanding after the United States, which "acquiesced in jurisdiction in the lower courts," contended "for the

first time" in its brief in opposition that the lower courts lacked subject-matter jurisdiction). This ace up the sleeve threatens to return the parties and courts to square one, nearly a decade after EPA issued the water transfer rule.

It is for just these reasons that "jurisdictional rules should be clear." *Lapides*, 535 U.S. at 621. The law interpreting Section 1369(b) is anything but—and confusion is only compounded by the extraordinary 1-1-1 decision below. This Court's intervention is urgently needed to bring clarity and certainty to jurisdiction over CWA rule challenges.

B. The Panel's Decision Would Deny Parties, Agencies, And Courts Of The Benefits Of Multilateral Review Of Agency Rulemaking.

1. The agencies have urged that it is good policy to funnel CWA rule challenges into a single court of appeals to provide "efficient, timely, and nationally-binding review of fundamental Clean Water Act regulatory actions." U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 60. In other words, the "policy" the agencies are concerned about is their own convenience and desire to suppress the full airing of issues that comes with multi-court review.

Those concerns carry no weight in the face of plain statutory language. As this Court has observed, jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 746 (1985). Put another way, "[i]t is not [the Court's] task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case." *Harrison*, 446 U.S. at 593. As EPA has been told before, it may not "avoid the Congressional intent clearly expressed in the text

simply by asserting that its preferred approach would be better policy." *Friends of the Earth* v. *EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006).

2. In fact, the panel's ruling, if allowed to stand, would disserve the federal judicial process, which depends on district courts and courts of appeals independently analyzing legal issues. Under the panel's ruling, challenges to important CWA regulations would be funneled to a single court of appeals, without the benefit of initial consideration by the district courts or the opinions of the other federal courts of appeals on the same issues. The quality of legal decision-making—and of this Court's ability to decide which cases to review—would be diminished.

Debate among lower courts "helps to explain and formulate the underlying principles this Court * * * must consider." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2597 (2015). It also "winnows out the unnecessary and discordant elements of doctrine." *California* v. *Carney*, 471 U.S. 386, 400-401 (1985) (Stevens, J., dissenting) (citing Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS 179 (1921)). Accordingly, this Court typically "permit[s] several courts of appeals to explore a difficult question before [it] grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984); see, *e.g.*, *Obergefell*, 135 S. Ct. at 2597.

The benefits of multi-court review accrue as clearly in the review of administrative rules as in other types of cases. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1155 (1990) (explaining "[w]hy [we] should * * * take uniform administrative decisions and subject them to review in the various regional circuit courts under a system that makes it possible for these courts to disagree with one another"). These benefits include

that "the possibility of intercircuit disagreement provides a simple device for signaling that certain hard cases are worthy of additional judicial resources"; that "the doctrinal dialogue that occurs when a court of appeals addresses the legal reasoning of another and reaches a contrary conclusion * * * improves the quality of legal decisions"; and that exploration of an issue by multiple courts aids this Court "both in its consideration of the legal merits of an issue and in its case selection decisions." *Id.* at 1156-1157.

Thus the circuit splits that the agencies fear may arise from initial consideration in multiple district courts "increase the probability of a correct disposition" (*Atchison, Topeka & Santa Fe Ry. Co.* v. *Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring)), and tee up issues more thoroughly for this Court's consideration. There is nothing about agency regulations that makes this process less appropriate for rule challenges than for other types of cases, like those involving the meaning or constitutionality of federal statutes. All the benefits of multi-court consideration would be lost if Section 1369(b) were stretched beyond the defined categories of agency action that Congress designated for original court of appeals review.

3. Furthermore, Section 1369(b) must be read in light of the default rule that Congress established in the APA, which is that agency action is subject to multilateral judicial review. "[I]n the absence or inadequacy" of a "special statutory review proceeding," any "person suffering legal wrong because of agency action" is "entitled to judicial review" "in a court of competent jurisdiction." 5 U.S.C. §§ 702-703. A plaintiff generally may file suit where it resides. See 28 U.S.C. §§ 1331, 1391(e); see also *Bowen* v. *Massachusetts*, 487 U.S. 879, 904 (1988) (Congress "inten[ded] that [the APA] cover a broad spectrum of administrative actions,

and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation"). In the absence of a clear statement from Congress in Section 1369(b), the Sixth Circuit should not have upended the APA judicial review process. This Court should grant certiorari to restore APA review to CWA rulemaking outside the narrow categories that Congress expressly specified in Section 1369(b).

C. Interlocutory Review Is Warranted

The interlocutory posture of the case counsels here in favor of an immediate grant of review. If, as we have argued—and as two of the panel judges believed—jurisdiction lies in the district courts under the APA, a merits ruling in the Sixth Circuit would serve no purpose. This Court would have no more authority to review a merits decision by the Sixth Circuit than would the Sixth Circuit to issue such a decision in the first place.

It thus makes no sense to delay deciding whether the court now addressing the merits has the statutory authority to do so while the parties file and the Sixth Circuit reads hundreds of pages of briefs, the court of appeals conducts oral argument and prepares an opinion (or opinions) on the merits, and untold party and judicial resources are expended in the process. Given the resources to be devoted to litigating the merits—and the importance of and great uncertainty over the correct resolution of the jurisdictional issue, in this case and more generally—immediate resolution of the question presented is imperative. Otherwise, the shadow of uncertain jurisdiction will hang over the merits stage before the panel, to reappear at the merits rehearing and certiorari stages. And a reversal on jurisdiction would hit the reset button on what by then

will have been years of litigation. Immediate review thus would serve the interests of regulators and regulated alike by ensuring that a merits decision actually resolves the merits and is not upended by a legal error over jurisdiction. It also would ensure that while the jurisdictional dispute plays out in this case, parties challenging new CWA rules do not face the same uncertainty over jurisdiction.

This Court routinely grants review of jurisdictional determinations even when (as here) the court of appeals holds jurisdiction proper and orders further proceedings. *E.g.*, *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014) (reviewing question concerning personal jurisdiction).

This Court's finality jurisprudence under 28 U.S.C. § 1257 also is instructive. The Court in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-558 (1963), reviewed a state court's interlocutory venue decision because it was "a separate and independent matter, anterior to the merits" and it made sense "to determine now" in which court "appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." If those considerations are sufficient to overcome even the barriers to review of non-final state court rulings, they should easily warrant interlocutory review of a federal court decision here.

Regardless of how this Court ultimately interprets Section 1369(b), Clean Water Act litigants deserve an answer to the question presented to bring to an end the current jurisdictional morass.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center
for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD CLAMAGE
JED GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

SEPTEMBER 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED. REG. 37,054 (JUNE 29, 2015).

MURRAY ENERGY CORPORATION (15-3751); STATE OF OHIO, ET AL. (15-3799); NATIONAL WILDLIFE FEDERATION (15-3817); NATURAL RESOURCES DEFENSE COUNCIL, INC. (15-3820); STATE OF OKLAHOMA (15-3822); CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL. (15-3823); STATE OF NORTH DAKOTA, ET AL. (15-3831); WATERKEEPER ALLIANCE INC., ET AL. (15-3837); PUGET SOUNDKEEPER ALLIANCE, ET AL. (15-3839); AMERICAN FARM BUREAU FEDERATION, ET AL. (15-3850); STATE OF TEXAS, ET AL. (15-3853); UTILITY WATER ACT GROUP (15-3858); SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL. (15-3885); STATE OF GEORGIA, ET AL. (15-3887); ONE HUNDRED MILES, ET AL. (15-3948); SOUTHEAST STORMWATER ASSOCIATION, INC., ET AL. (15-4159); MICHIGAN FARM BUREAU (15-4162); WASHINGTON CATTLEMEN'S ASSOCIATION (15-4188); ASSOCIATION OF AMERICAN RAILROADS, ET AL. (15-4211); TEXAS ALLIANCE FOR RESPONSIBLE GROWTH, ENVIRONMENT, AND TRANSPORTATION (15-4234); AMERICAN EXPLORATION & MINING ASSOCIATION (15-4305); ARIZONA MINING ASSOCIATION, ET AL. (15-4404),

Petitioners,

v.

UNITED STATES DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

Nos. 15-3751 /3799/ 3817/
3820/ 3822/ 3823/ 3831/
3837/ 3839/ 3850/ 3853/ 3858/
3885/ 3887/ 3948/4159/ 4162/
4188/ 4211/ 4234/ 4305/ 4404

On Petitions for Review of Final Rule of the United States Department of Defense and United States Environmental Protection Agency.

Judicial Panel on Multi-District Litigation, No. 135.

Argued: December 8, 2015
Decided and Filed: February 22, 2016

Before: KEITH, McKEAGUE, and GRIFFIN, *Circuit Judges.*

COUNSEL

ARGUED: Eric E. Murphy, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Petitioners. Martha C. Mann, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

McKEAGUE, J., delivered the opinion in which GRIFFIN, J., joined in the result. GRIFFIN, J., delivered a separate opinion concurring in the judgment. KEITH, J., delivered a separate dissenting opinion.

OPINION

McKEAGUE, *Circuit Judge.* This multi-circuit case consists of numerous consolidated petitions challenging the validity of the "Clean Water Rule" recently published by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency ("the Agencies"). The Clean Water Rule is intended to clarify the scope of "the waters of the United States" subject to protection under the Clean Water Act. The Act provides that certain specified actions of the EPA Administrator are reviewable directly in the U.S. Circuit Courts of Appeals. Because of uncertainty about whether the Agencies' adoption of the Clean Water Rule is among these specified actions, parties challenging the Rule have filed petitions in both district courts and circuit courts across the country. Many of the petitions have been transferred to the Sixth Circuit for consolidation in this action. Many of the petitioners and other parties now move to dismiss the very petitions they filed invoking this court's jurisdiction, contending this court lacks jurisdiction to review the Clean Water Rule.

The movants find support for their position in the language of the Clean Water Act's judicial review provisions, which purport to define circuit court jurisdiction specifically and narrowly. Over the last 35

years, however, courts, including the Supreme Court and the Sixth Circuit, have favored a "functional" approach over a "formalistic" one in construing these provisions. These precedents support the Agencies' position that this court does have jurisdiction. The district courts that have confronted the jurisdictional question in this litigation have arrived at conflicting answers.[1] For the reasons that follow I conclude that Congress's manifest purposes are best fulfilled by our exercise of jurisdiction to review the instant petitions for review of the Clean Water Rule.

I. BACKGROUND

Petitioners in these various actions, transferred to and consolidated in this court by the Judicial Panel on Multi-District Litigation for handling as a multi-circuit case, challenge the validity of a Final Rule adopted by respondents U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, "the Clean Water Rule." 80 Fed. Reg. 37,054 (June 29, 2015). The Clean Water Rule clarifies the definition of "waters of the United States," as used in the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, "through increased use of bright-line boundaries" to make "the process of identifying waters protected under the Clean Water Act easier to understand, more predictable and consistent with the law and peer reviewed

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[1] *See Murray Energy Corp. v. U.S. E.P.A.*, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015) (holding jurisdiction lies in circuit court); *State of Georgia v. McCarthy*, 2015 WL 5092568 at *2–3 (S.D. Ga. Aug. 27, 2015) (same); *North Dakota v. U.S. E.P.A.*, 2015 WL 5060744 at *2 (D. N.D. Aug. 27, 2015) (holding jurisdiction lies in district court).

science, while protecting the streams and wetlands that form the foundation of our nation's water resources." 80 Fed. Reg. at 37,055. Petitioners contend that the definitional changes effect an expansion of respondent Agencies' regulatory jurisdiction and dramatically alter the existing balance of federal-state collaboration in restoring and maintaining the integrity of the nation's waters. Petitioners also contend the new bright-line boundaries used to determine which tributaries and waters adjacent to navigable waters have a "significant nexus" to waters protected under the Act are not consistent with the law as defined by the Supreme Court, and were adopted by a process not in conformity with the rulemaking requirements of the Administrative Procedures Act ("APA"). The Agencies maintain that the requirements of the APA were met and that the Rule is a proper exercise of their authority under the Clean Water Act.

The Rule became effective on August 28, 2015. On October 9, 2015, however, we issued a nationwide stay of the Rule pending further proceedings in this action. *In re EPA and Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). We found that petitioners had demonstrated a substantial possibility of success on the merits of their claims and that the balance of harms militated in favor of preserving the status quo pending judicial review.

Meanwhile, eight motions to dismiss have been filed by numerous petitioners and intervenors. The motions assert that judicial review is properly had in the district courts, not here. They contend the instant challenges to the Clean Water Rule do not come within the judicial review provisions of the Clean Water Act, 33 U.S.C. § 1369(b)(1).

Section 1369(b)(1) identifies seven kinds of action by the EPA Administrator that are reviewable directly in the circuit courts. Only two of the seven kinds of action listed in § 1369(b)(1) are implicated here, subsections (E) and (F). In its entirety, § 1369(b)(1) provides as follows:

> (1) Review of the Administrator's action
>
> (A) in promulgating any standard of performance under section 1316 of this title,
>
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
>
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title, and
>
> (G) in promulgating any individual control strategy under section 1314(l) of this title,
>
> may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

> Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

33 U.S.C. § 1369(b)(1).

Movants contend the EPA's and the Corps' adoption and promulgation of the Clean Water Rule is not action of the Administrator "in issuing or promulgating any effluent limitation or other limitation" or "in issuing or denying any permit" under § 1369(b)(1)(E) or (F). They contend the Clean Water Rule is simply a definitional rule and that neither the statutory language nor the legislative history evidences congressional intent to authorize direct review of such action in the circuit courts.

II. ANALYSIS

A. General Standards

The question of subject matter jurisdiction is a question of law the court addresses de novo. *Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844, 861 (8th Cir. 2013). That is, the Agencies' interpretation of the Clean Water Act is entitled to no deference in this regard. *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1285 (11th Cir. 2012).

Federal courts are courts of limited jurisdiction and have subject matter jurisdiction only as authorized by the Constitution and by Congress. *Id.* at 1289. Here, the court's authority to conduct direct review of the Agencies' challenged action, must be found, if at all, in the Clean Water Act, 33 U.S.C. § 1369(b)(1). *Id.* at 1285 (recognizing availability of

direct circuit court review only over those actions specifically enumerated in § 1369(b)(1)). Not all actions taken under the Clean Water Act are directly reviewable in the circuit courts. *Nat'l Cotton Council of America v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009). Where review is available under § 1369(b)(1), "it is the exclusive means of challenging actions covered by the statute." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1334 (2013). Matters not reviewable under § 1369(b)(1) may be actionable in the district courts by other means. *See id.* (recognizing availability of private enforcement action under 33 U.S.C. § 1365); *Narragansett Elec. Co. v. U.S. E.P.A.*, 407 F.3d 1, 8 (1st Cir. 2005) (recognizing availability of judicial review in district court under the APA).

Whether subject matter jurisdiction lies in the circuit courts is governed by the intent of Congress. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985). In determining the scope of circuit court jurisdiction Congress intended to prescribe under the Clean Water Act, the analysis must begin with the statutory language. *Id.* at 735. Yet, even where statutory language may seem unambiguous, "plain meaning, like beauty, is sometimes in the eye of the beholder." *Id.* at 737. The parties agree that subsections (E) and (F) are the only two provisions of § 1369(b)(1) that potentially apply.

B. Statutory Language

1. Subsection (E)—"Other Limitation"

Movants contend the Rule's definition of "waters of the United States" is not, under § 1369(b)(1)(E), "an effluent limitation or other limitation" approved or promulgated under 33 U.S.C. § 1311, 1312, 1316, or 1345. "Effluent limitation" is defined as "any re-

striction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

The Agencies do not contend that the Clean Water Rule is an action in approving or promulgating an effluent limitation, but rather that it is an "other limitation." The Act does not define "other limitation." Inasmuch as "effluent limitation" is defined as a "restriction" on discharges from point sources, the Agencies contend "other limitation" must be understood as a different kind of "restriction." They contend the Rule's clarification of the scope of "waters of the United States" protected under the Clean Water Act constitutes an "other limitation" in two respects. First, it has the effect of restricting the actions of property owners who discharge pollutants from a point source into covered waters. Second, it has the effect of imposing limitations or restrictions on regulatory bodies charged with responsibility for issuing permits under the National Pollutant Discharge Elimination System ("NPDES") to those who discharge pollutants into covered waters.

On its face, the Agencies' argument is not compelling. After all, the Rule's clarified definition is not self-executing. By clarifying the definition, the Agencies did not approve or promulgate any limitation that imposes *ipso facto* any restriction or requirement on point source operators or permit issuers. Rather, they promulgated a definitional rule that, operating in conjunction with other regulations, will result in imposition of such limitations. Is such

direct circuit court review only over those actions specifically enumerated in § 1369(b)(1)). Not all actions taken under the Clean Water Act are directly reviewable in the circuit courts. *Nat'l Cotton Council of America v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009). Where review is available under § 1369(b)(1), "it is the exclusive means of challenging actions covered by the statute." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1334 (2013). Matters not reviewable under § 1369(b)(1) may be actionable in the district courts by other means. *See id.* (recognizing availability of private enforcement action under 33 U.S.C. § 1365); *Narragansett Elec. Co. v. U.S. E.P.A.*, 407 F.3d 1, 8 (1st Cir. 2005) (recognizing availability of judicial review in district court under the APA).

Whether subject matter jurisdiction lies in the circuit courts is governed by the intent of Congress. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985). In determining the scope of circuit court jurisdiction Congress intended to prescribe under the Clean Water Act, the analysis must begin with the statutory language. *Id.* at 735. Yet, even where statutory language may seem unambiguous, "plain meaning, like beauty, is sometimes in the eye of the beholder." *Id.* at 737. The parties agree that subsections (E) and (F) are the only two provisions of § 1369(b)(1) that potentially apply.

B. Statutory Language

1. Subsection (E)—"Other Limitation"

Movants contend the Rule's definition of "waters of the United States" is not, under § 1369(b)(1)(E), "an effluent limitation or other limitation" approved or promulgated under 33 U.S.C. § 1311, 1312, 1316, or 1345. "Effluent limitation" is defined as "any re-

striction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

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an indirect consequence sufficient to bring the Rule within the scope of § 1369(b)(1)(E)?

The Agencies say yes and cite several cases in support. The seminal case supporting their construction of subsection (E) is *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112, 136 (1977), where the Supreme Court eschewed a strict, literal reading. The Court characterized a construction that would provide for direct circuit court review of individual actions issuing or denying permits, but disallowed such review of the "basic regulations governing those individual actions," as a "truly perverse situation." *Id.* Hence, even though § 1369(b)(1) provided for circuit court review only of limitations promulgated under certain enumerated sections, and the challenged regulation was promulgated under a different section—which was, however, closely related to one of the enumerated sections—the Court had "no doubt that Congress intended review of the two sets of regulations to be had in the same forum." *Id.* at 136–37. The Court thus construed § 1369(b)(1)(E), in light of Congress's manifest intent, to encompass review of more agency actions than a literal reading of the provision would suggest.

E.I. du Pont can be read in more ways than one. As the Agencies see it, the Clean Water Rule is a "basic regulation governing those individual actions" taken by the EPA Administrator (e.g., promulgation of limitations) that *are* subject to direct circuit court review. Accordingly, giving § 1369(b)(1) a practical construction per *E.I. du Pont*, the Agencies argue that Congress intended the lawfulness of the Clean Water Rule to be subject to direct circuit court review.

Their position finds support in several decisions of our sister circuits. In *Nat. Res. Def. Council v. U.S. E.P.A.*, 673 F.2d 400 (D.C. Cir. 1982) (J. Ginsburg), a case closely analogous to ours, the D.C. Circuit addressed numerous consolidated challenges to EPA regulations that had been filed in circuit courts of appeals and district courts. The regulations did not establish any numerical limitations, but prescribed permitting procedures that constituted "a limitation on point sources and permit issuers and a restriction on the untrammeled discretion of the industry." *Id.* at 405 (internal quotation marks omitted). Following *E.I. du Pont*, the court held this "limitation" was sufficient to bring the regulations within the ambit of direct circuit court review under § 1369(b)(1)(E). Employing "a practical rather than a cramped construction," the court held that direct review in the circuit court was appropriate, even though the regulations did not impose technical requirements but were "far more general and rest[ed] dominantly on policy choices." *Id.* In fact, the court cited several reasons for concluding that such "broad, policy-oriented rules" are actually more suitable for direct circuit court review than "specific technology-based rules." *Id.* at 405 n.15. The court noted that *E.I. du Pont* "does not unequivocally dictate our result but [its] reasoning strongly supports our holding that we have jurisdiction." *Id.* at 406.

In *Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446 (4th Cir. 1977) ("*VEPCO*"), the Fourth Circuit addressed consolidated petitions challenging EPA regulations prescribing requirements for the location, design, construction and capacity of cooling water intake structures used to withdraw from, rather than discharge into, covered waters. The challengers

argued that such requirements could not be "other limitations" under § 1369(b)(1)(E) until they were actually adopted in an individual permit proceeding. Because the requirements were not self-executing, the challengers argued they were only presumptively applicable and did not actually impose any limitation or restriction on point-source discharges. The court held the argument was foreclosed by *E.I. du Pont. VEPCO*, 566 F.2d at 449–50. The court held the requirement that certain information be considered in determining the best available technology for intake structures was a sufficient restriction on the discretion of point source operators and permit issuers to constitute an "other limitation" under subsection (E). *Id.* Further, citing *E.I. du Pont*, the court noted the regulations were so closely related to effluent limitations, that "it would be anomalous to have their review bifurcated between different courts." *Id.* at 450. The court held that circuit court review was proper under subsection (E), stating that "this result is consistent with the jurisdictional scheme of the Act, which in general leaves review of standards of nationwide applicability to the courts of appeals, thus furthering the aim of Congress to achieve nationally uniform standards." *VEPCO*, 566 F.2d at 451.

More recently, the Eighth Circuit followed suit. In *Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844 (8th Cir. 2013), the court addressed two letters from the EPA sent to a senator and alleged to have effectively established new regulatory standards governing municipal water treatment processes. The court first noted that "the Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the APA." *Id.* at 861 (citing *Fla. Power*, 470 U.S. at 745). The court rejected the

EPA's contention that the subject letters, couched in terms of what "should not be permitted" by regulated entities, did not "promulgate" a binding limitation. Noting that the EPA had characterized the letters as expressing its position or policy, the court dismissed the notion that the instruction was not binding as "Orwellian Newspeak." *Id.* at 865. The court did not cite *E.I. du Pont*, but adopted the *VEPCO* formulation of "limitation" and went on to hold that subsection (E) applies if "entities subject to the CWA's permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes." *Id.* at 866.

These decisions from the D.C., Fourth, and Eighth Circuits demonstrate courts' willingness to view *E.I. du Pont* as license to construe Congress's purposes in § 1369(b)(1) more generously than its language would indicate.[2] However, movants herein read *E.I. du Pont* differently. They argue *E.I. du Pont*'s holding is narrower and should be limited to its facts. In support they cite decisions from the Eleventh and Ninth Circuits refusing to find circuit court jurisdiction under subsection (E).

In both *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1287 (11th Cir. 2012), and *Northwest Environmental Advocates v. U.S. E.P.A.*, 537 F.3d

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[2] Most recently, the "functional approach" employed in these cases was applied by two district courts in relation to the Clean Water Rule in *this* litigation to find circuit court jurisdiction under subsection (E). *Murray Energy Corp. v. U.S. E.P.A.*, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015); *State of Georgia v. McCarthy*, 2015 WL 5092568 at *2–3 (S.D. Ga. Aug. 27, 2015).

1006, 1015–16 (9th Cir. 2008), the courts reached *results* different from those reached in the D.C., Fourth, and Eighth Circuits. However, the decisions in all five circuits are readily reconcilable. In both *Friends of the Everglades* and *Northwest Environmental*, the courts acknowledged the above discussed *NRDC* and *VEPCO* rulings, but found the regulations before them materially distinguishable from those deemed to come within the scope of § 1369(b)(1)(E). Far from *restricting* "untrammeled discretion," the regulations at issue in *Friends of the Everglades* and *Northwest Environmental* actually created *exemptions* from limitations. Both courts concluded that an exemption from limitation simply cannot be fairly characterized as a limitation. Neither court criticized the approach adopted in *E.I. du Pont* and applied in *NRDC* and *VEPCO*. Nor did either court reject the notion that an "other limitation" can be made out by an indirect restriction on discretion. Rather, *Friends of the Everglades* and *Northwest Environmental* held that no construction could render an exemption from limitation what it plainly is not: a "limitation" under subsection (E).[3] The two lines of authority are therefore not inconsistent.

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[3] These authorities were cited as persuasive in *this* litigation by one district court. *North Dakota v. U.S. E.P.A.*, 2015 WL 5060744 at *2 (D. N.D. Aug. 27, 2015). However, the *North Dakota* court ignored the fact that, unlike the regulations at issue in those cases, the Clean Water Rule does not create an exemption. And despite noting the pertinence of the *NRDC-VEPCO-Iowa League* line of cases, the *North Dakota* court conspicuously ignored their holdings.

Here we acknowledge that the Rule is definitional only and does not *directly* impose any restriction or limitation. Yet, neither does the Rule create an exemption from limitation. By clarifying the definition of "waters of the United States," the Rule undeniably has the *indirect* effect of altering permit issuers' authority to restrict point-source operators' discharges into covered waters. The alteration invariably results in expansion of regulatory authority in some instances and imposition of additional restrictions on the activities of some property owners. These restrictions, of course, are presumably the reason for petitioners' challenges to the Rule. Hence, although the Rule is definitional in nature, it is undeniably, in the language of *E.I. du Pont*, a "basic regulation governing other individual actions issuing or denying permits." 430 U.S. at 136. To rule that Congress intended to provide direct circuit court review of such individual actions but intended to exclude from such review the definitional Rule on which the process is based, would produce, per *E.I. du Pont*, "a truly perverse situation." *Id.* To avoid just such an outcome, the *E.I. du Pont* Court reasoned that Congress must have intended that both types of regulation would be subject to review in the same forum, i.e., the circuit courts.[4]

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[4] *E.I. du Pont*'s analysis is also dispositive of movants' argument that review under subsection (E), by its terms, applies only to action by the EPA Administrator approving or promulgating a limitation "under section 1311, 1312, 1316, or 1345 of this title." Movants contend that all of these sections pertain to effluent limitations. Inasmuch as the Agencies do not even argue that the Clean Water Rule represents an effluent limitation,

E.I. du Pont is the last word from the Supreme Court on § 1369(b)(1)(E). It is still good law. Our sister courts in the D.C., Fourth, and Eighth Circuits have all applied *E.I. du Pont*'s approach and have defined the scope of direct circuit court review under subsection (E) more broadly than a strict interpretation of its language would indicate. The two circuit-level decisions, from the Ninth and Eleventh Circuits, that declined to find circuit court jurisdiction under subsection (E) did so in relation to agency action materially distinguishable from the Rule here at issue. The movants' position is thus devoid of substantial case law support. While their plain-language arguments are not without facial appeal, we are hardly at liberty to ignore the consistent body of case law that has sprung from that language in encounters with the real world. In response to concern about producing a "perverse situation" seemingly at odds with congressional purpose, movants have no answer beyond their argument that Congress must be held to say what it means and mean what it says. Were we writing on a blank slate, the argument would be more persuasive, but we're not. As an "inferior court," we are obliged to take our lead from

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movants contend the Rule cannot be deemed to have been promulgated under any of these sections.

Yet, the Rule purports to be adopted under authority, *inter alia*, of section 311 (33 U.S.C. § 1311). 80 Fed. Reg. at 37,055. And subsection (E) prescribes direct circuit court review of any "other limitation," in addition to any effluent limitation. It follows that the Rule, representing an "other limitation" as defined in *E.I. du Pont* and its progeny, and adopted pursuant to § 1311, comes within the scope of circuit court review under § 1369(b)(1)(E).

the Supreme Court. Having discerned no persuasive grounds to depart from the rationale that controlled in *E.I. du Pont*, I conclude that we, like our sister circuits, must follow its lead.

Viewing the Clean Water Rule through the lens created in *E.I. du Pont* reveals a regulation whose practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities. Accordingly, although the Rule does not itself impose any limitation, its effect, in the regulatory scheme established under the Clean Water Act, is such as to render the Rule, per the teaching of *E.I. du Pont* and its progeny, subject to direct circuit court review under § 1369(b)(1)(E).

2. Subsection (F)—"Issuing or Denying Permit"

Evaluation of the second claimed basis for direct circuit court review proceeds in like manner. Movants argue that § 1369(b)(1)(F) does not justify jurisdiction in the circuit court because the Clean Water Rule is not an action of the EPA Administrator "in issuing or denying a permit." Yet, in relation to subsection (F), too, the Supreme Court has opened the door to constructions other than a strict literal application. In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97 (1980), the Court reversed the Ninth Circuit and held that an action of the Administrator "functionally similar" to denial of a permit is encompassed within subsection (F). If the "precise effect" of the action would be to deny a permit, the Court reasoned, it would be irrational to conclude, based on a strictly literal application of subsection (F), that the action would be subject to review in district court rather than circuit court. The Court rec-

ognized that direct review in the circuit court "would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." *Id.* at 196. Addition of another level of judicial review, the Court observed, "would likely cause delays in resolving disputes under the Act." *Id.* at 197. In conclusion, the Court remarked: "Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated review system." *Id.*

Here, similarly, the Agencies contend that the effect of the Clean Water Rule, operating in the extant regulatory scheme, is to impact permitting requirements, thereby affecting the granting and denying of permits. This is enough, the Agencies argue, to bring the Clean Water Rule within the ambit of subsection (F), because it too impacts permitting requirements. In support they cite a Sixth Circuit case, *Nat'l Cotton Council v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009), *cert. denied sub nom. Crop Life v. Baykeeper*, 130 S.Ct. 1505 (2010), and *Am. Farm Bureau Fed'n v. Baykeeper*, 130 S.Ct. 1505 (2010). In *National Cotton*, this court held that subsection (F) authorizes direct circuit court review not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits. The court relied on authorities from the Ninth Circuit and D.C. Circuit stemming from *E.I. du Pont* and *Crown Simpson*. *See Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292, 1296–97 (9th Cir. 1992); *Am. Mining Cong. v. U.S. E.P.A.*, 965 F.2d 759, 763 (9th Cir. 1992); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 656 F.2d 768, 775 (D.C. Cir. 1981). In fact, the *National Cotton* court noted that this more expansive reading of subsection (F) encompassed even regulations that

exempted certain discharges from permitting requirements. *Nat'l Cotton*, 553 F.3d at 933. That is, under subsection (F), a regulation that imposes no restriction or limitation is reviewable in circuit court, so long as it affects permitting requirements.[5]

Movants maintain that a mere impact on permitting requirements is not enough to bring the Rule within subsection (F). They contend the holding of *Crown Simpson*'s expansion of the plain language of the provision is really quite narrow and that *National Cotton*'s reading of subsection (F) is overly broad and even inconsistent with *Crown Simpson*. They contend the "precise effect" of the Clean Water Rule is *not* to deny any permit and that it is therefore not "functionally similar."

Movants attack *National Cotton* on several fronts. First, they contend the decision is not entitled to precedential weight because its determination of jurisdiction was summary in nature and devoid of substantive analysis. In support they cite *Emswiler v. CSX Transportation, Inc.*, 691 F.3d 782, 788–90 (6th Cir. 2012), for the proposition that "drive-by jurisdictional rulings" based on "less than meticulous" reasoning should be accorded no precedential effect. *Emswiler* is inapposite. The *Emswiler* court used these characterizations in relation to an opinion's careless characterization of a party's failure to meet a threshold exhaustion requirement as depriving the

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[5] *National Cotton* was followed in *this* litigation in *Murray Energy*, 2015 WL 5062506 at *5–6, the court noting there was no dispute that the Clean Water Rule will have an impact on permitting requirements.

court of subject matter jurisdiction. While the failure to exhaust impacted the plaintiff's ability to win relief on the merits, the *Emswiler* court called it "less than meticulous" to say the failure to exhaust deprived the court of subject matter jurisdiction. *Id.* at 789. The *National Cotton* jurisdictional ruling was not the product of carelessness. It is succinct because it efficiently follows the holdings of several other rulings—one by the Supreme Court—whose reasoning it implicitly incorporated by citing them.

Granted, the Eleventh Circuit expressly declined to follow *National Cotton* in *Friends of the Everglades*, 699 F.3d at 1288, rejecting the position that *Crown Simpson* legitimized direct circuit court review of any "regulations relating to permitting itself." The court noted that, although the Sixth Circuit adopted that interpretation in *National Cotton*, it did so in reliance on two Ninth Circuit cases that had since been distinguished by the Ninth Circuit in *Northwest Environmental*, 537 F.3d at 1016–18. In *Northwest Environmental*, 537 F.3d at 1018, as in *Friends of the Everglades*, 699 F.3d at 1288, the court ruled that a regulation creating a permanent exemption from the permitting process could not have the effect of granting or denying a permit reviewable under § 1369(b)(1)(F) precisely because the regulation *excluded* certain discharges from the permitting process altogether.

Yet, even if it be conceded that *National Cotton* said too much when it noted in *dicta* that the Ninth Circuit had construed subsection (F) broadly enough to include an exemption from regulation, the fact remains that the action here under review is not an exemption. Rather, both petitioners and the Agencies operate on the understanding that the effect of

the Clean Water Rule is not solely to exclude waters from protection, but to extend protection to some additional waters. This extension indisputably expands regulatory authority and impacts the granting and denying of permits in fundamental ways. The later clarification of Ninth Circuit law noted in *Friends of the Everglades* does not, therefore, in any way undermine the authority of *National Cotton* as applied to the Clean Water Rule.

Finally, movants contend *National Cotton* is wrongly decided. They contend that *Crown Simpson*'s expanded construction of subsection (F) was narrow and circumscribed; whereas *National Cotton*'s holding that subsection (F) authorizes circuit court review of "regulations governing the issuance of permits" is unduly broad. Perhaps. Yet, if we believed *National Cotton* was not distinguishable and was wrongly decided, we would still not be free to reject its holding. Generally, in a multi-circuit case where a question of federal law is at issue, the transferee court is obliged to follow its own interpretation of the relevant law. *See Murphy v. FDIC*, 208 F.3d 959, 964–65 (11th Cir. 2000) (citing *In re Korean Airlines Disaster*, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987), and observing that other circuits have uniformly agreed with the D.C. Circuit). Moreover, no other court has held that *National Cotton* was wrongly decided. *National Cotton*, as well as the Ninth Circuit and D.C. Circuit authorities on which it relied, are still good law. Movants have not identified any materially contrary authority.

Furthermore, *National Cotton*'s construction is consistent with congressional purpose, which appears to have been the guiding light in both *E.I. du Pont* and *Crown Simpson*. In *Florida Power*, 470

U.S. at 744–45, in relation to the Atomic Energy Act, the Court recognized that "one crucial purpose" of statutes providing for direct circuit court review of agency action is judicial economy. *Id.* at 744. The Court noted that the district court's superior fact-finding capacity is typically unnecessary to judicial review of agency action. On the other hand, providing for initial review in the district court has the negative effect of "requiring duplication of the identical task in the district court and in the court of appeals; both courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Id.* The Court acknowledged that the intent of Congress, not the Court's concept of sound policy, is ultimately determinative, but concluded:

> Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals.

Id. at 746. *See also Tennessee v. Herrington*, 806 F.2d 642, 650 (6th Cir. 1986) (following *Florida Power* and noting that where Congress has provided for direct circuit court review but its intent is ambiguous in a specific case, policy considerations are relevant); *Natural Resources Def. Council v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (citing cases from Second, Seventh, Tenth and D.C. Circuits for the proposition that "when there *is* a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals.").

National Cotton's broader reading of subsection (F) is thus consistent with the preference in favor of circuit court review recognized in *Florida Power* and implicitly at work in both *E.I. du Pont*, *see* 430 U.S. at 128 (characterizing it as "almost inconceivable that Congress would have required duplicate review in the first instance by different courts"), and *Crown Simpson*, *see* 445 U.S. at 196–97 (noting unwillingness to conclude Congress intended to cause delays that would result from duplicative review process).

In *Florida Power*, the Court overruled Justice Stevens' objection that proper deference to Congress required enforcement of "the plain and simple construction of the statutory language." *Id.* at 750. Justice Stevens' plain-language position, like that of movants in this case, is not devoid of logic. Yet, as Justice Stevens protested, the Court rejected it as a matter of mere "semantic quibbles." *Id.* We do not view movants' plain-language arguments as semantic quibbles, but, in my view, they have clearly failed to identify any *substantial* reason to conclude the preference favoring direct circuit court review—created by Congress in § 1369(b)(1) and honored by the Supreme Court—does not, in this case, ultimately serve all parties' interests in efficiency, judicial economy, clarity, uniformity and finality.

Florida Power, like *E.I. du Pont* and *Crown Simpson*, demonstrates a strong preference for construing Congress's provision for direct circuit court review of agency action by a practical, functional approach rather than a technical approach. A holding that we have jurisdiction to hear the instant petitions for review of the Clean Water Rule is consistent with this understanding. On the other hand, a contrary ruling, though facially consonant with the plain

language of § 1369(b)(1), finds practically no solid support in the case law. Accordingly, I conclude that we have jurisdiction under subsection (F) as well.

C. Miscellaneous Objections

Movants present arguments based on other statutory provisions, items of legislative history and canons of construction. The arguments are not persuasive. That the Clean Water Rule was promulgated jointly by the EPA Administrator *and* the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the Administrator. The items of legislative history identified by the parties and said to be probative of congressional intent are sparse and frankly shed little light on the specific jurisdictional questions before the court. *See E.I. du Pont*, 430 U.S. at 133 (dismissing arguments based on other provisions of the statute and legislative history as inconclusive and not deserving of detailed discussion). Similarly, the various canons of construction alluded to by the parties are inconclusive and carry little weight in comparison with the dispositive considerations, as defined in the foregoing discussion of the guiding case law.

Movants also raise what they characterize as "due process concerns." They contend that if circuit court jurisdiction is exercised under § 1369(b)(1), then any other challenges to the Clean Water Rule not made within 120 days after its promulgation are foreclosed unless based on grounds which arose after the 120th day, per § 1369(b)(2). If subsequent as-applied challenges are thus deemed precluded, then unwary point-source operators and landowners uncertain about the scope of the Clean Water Act's regulatory reach may be subject to enforcement actions

and penalties without fair notice of the conduct prohibited. In *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992), the Ninth Circuit referred to this preclusive effect as a "peculiar sting."

The concern is speculative and overblown in this case. If the court exercises jurisdiction over petitioners' instant challenges to the validity of the Rule in this nationwide multi-circuit case and upholds the Rule, then that determination *should* have preclusive effect. *See Narragansett Elec. Co. v. U.S. E.P.A.*, 407 F.3d 1, 5 (1st Cir. 2005) (noting that "the short time frame in § 1369(b) clearly reflects some effort to protect the EPA's interests in finality in certain matters, particularly certain rulemakings with substantial significance and scope."). On the other hand, this court's exercise of jurisdiction and ruling on a challenge to the *validity* of the Rule would not preclude challenge to subsequent *application* of the Rule in a particular permitting requirement or enforcement action. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1335 (2013) (noting that whereas a challenge to the validity of regulations would be subject to the exclusive jurisdictional bar of § 1369(b)(2), an enforcement action would not be). To the extent our eventual ruling on the validity of the Rule might conceivably be asserted in overbroad fashion as barring a defense against application of the Rule in an enforcement action, the asserted bar would be subject to testing as excessive and unfairly prejudicial in that action. *See Nat. Res. Def. Council v. U.S. E.P.A.*, 673 F.3d 400, 407 (D.C. Cir. 1982) (rejecting the same "due process" argument and suggesting that overbroad application of the § 1369(b)(2) bar could be challenged, when ripe, as unconstitutional).

We therefore reject movants' "due process concerns" as premature and unfounded.

III. CONCLUSION

Both sides have presented worthy arguments in support of their respective positions on jurisdiction. Since enactment of the Clean Water Act in 1972, the jurisdictional provisions of § 1369(b)(1)(E) and (F) have been subjected to judicial scrutiny in relation to various regulatory actions and have been consistently construed not in a strict literal sense, but in a manner designed to further Congress's evident purposes. Pursuant to the uniform trend of the instructive case law, the scope of direct circuit court review has gradually expanded. In response, Congress has not moved to amend the provision or otherwise taken "corrective" action. As explained above, the instant petitions for review of the Clean Water Rule come within the scope of subsections (E) and (F), as they have come to be defined in the governing case law. Movants have failed to identify any particular circumstances or practical considerations that would justify holding that adjudication of the instant petitions for judicial review in the various district courts would better serve Congress's purposes. Instead, recognition of our authority and our duty to directly review the Clean Water Rule in this multi-circuit case is in all respects consonant with the governing case law and in furtherance of Congress's purposes. Conversely, to rule that we lack jurisdiction would be to contravene prevailing case law and frustrate congressional purposes without substantial justification.

We hold that jurisdiction is properly laid in this court. All pending motions to dismiss are **DENIED**.

CONCURRING IN THE JUDGMENT

GRIFFIN, *Circuit Judge*, concurring in the judgment, only.

I concur in the judgment holding that we possess subject-matter jurisdiction in this case; thus, I join in denying petitioners' motions to dismiss. However, I do so only because I am required to follow our precedentially-binding decision, *National Cotton Council of America v. U.S. E.P.A.*, 553 F.3d 927 (6th Cir. 2009). Were it not for *National Cotton*, I would grant the motions to dismiss.

I.

Congress establishes the jurisdiction of the courts of appeals and other inferior courts. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004). In determining whether the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, creates jurisdiction in our court over a case or controversy, we must examine and apply the terms of the statute enacted by Congress. As with all matters of statutory construction, we should apply a textualist, not a "functional" or "formalistic," approach.[1]

[1] With a heavy heart, I acknowledge the sudden passing of Justice Antonin Scalia. Justice Scalia was the founder and champion of the modern textualist mode of constitutional and statutory construction. His essay, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), and other writings and opinions profoundly influenced a generation of attorneys, legal

In this regard, "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Id.* at 490. Recognizing the consequences of unbridled judicial forays into the legislative sphere, the Supreme Court has admonished "'time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). Accordingly, "[w]hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (internal citations and quotation marks omitted).

Whether it is desirable for us to possess jurisdiction for purposes of the efficient functioning of the judiciary, or for public policy purposes, is not the issue. Rather, the question is whether Congress in fact created jurisdiction in the courts of appeals for this case. I conclude that it did not.

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scholars, and judges. Justice Scalia's legacy will live on for decades in countless opinions such as this one.

The Environmental Protection Agency and the U.S. Army Corps of Engineers ("the Agencies") argue that both 33 U.S.C. § 1369(b)(1)(E) and (F) vest this court with jurisdiction regarding petitioners' claims. In my view, it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues. Nonetheless, because *National Cotton* held otherwise with respect to subsection (F), I concur in the judgment, only.

II.

Subsection (E) creates jurisdiction to review an action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title[.]" Sections 1311 and 1312 specifically set forth effluent limitations and water quality related-effluent limitations. Sections 1316 and 1345 provide additional limitations on discharges and sewage sludge to achieve state water quality standards when those in sections 1311 and 1312 fall short. The Act defines "effluent limitation" as expressly relating to *discharges*:

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are *discharged* from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

§ 1362(11) (emphasis added). It does not define "other limitation."

Petitioners ask that we draw an associational link between effluent and other limitations, directing this court to a Fourth Circuit case that speaks in terms of an "other limitation" being "closely related" to "effluent limitations," *Va. Elect. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) ("*VEPCO*"), and to a Seventh Circuit case holding that "other limitation" is "restricted to limitations directly related to effluent limitations." *Am. Paper Inst., Inc. v. U.S. E.P.A.*, 890 F.2d 869, 877 (7th Cir. 1989). On the other hand, the Agencies advocate for—and the lead opinion applies—a broad reading of "other limitation"; that is, "other limitation" includes "restrictions that are *not* effluent limitations."

In my view, both are wrong. Whatever the relationship may be between effluent and other limitations, the plain text of subsection (E) clearly delineates what the limitations are, and what they are not: the "limitations" set forth in §§ 1311, 1312, 1316, and 1345 provide the boundaries for what constitutes an effluent or other limitation. The statutory interpretation canon, *noscitur a sociis*, drives this point home. Simply, "a word is known by the company it keeps" to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (citation omitted). Application of this canon is simple: "any effluent limitation or other limitation" must be related to the statutory boundaries set forth in §§ 1311, 1312, 1316, and 1345.

The problem with the boundaries for the Agencies is that the definitional section the Clean Water Rule modifies—"[t]he term 'navigable waters' means the waters of the United States, including the terri-

torial seas"—does not emanate from these sections. It is a phrase used in the Act's definitional section, § 1362, and no more. But the definitional section is not mentioned in § 1369, let alone the specific sections listed in subsection (E). And the definitional section, as the lead opinion acknowledges, is not self-executing; at best, it operates in conjunction with other sections scattered throughout the Act to define when its restrictions even apply. Accordingly, the lack of any reference to § 1362 in subsection (E) counsels heavily against a finding of jurisdiction. *See Friends of Earth v. U.S. E.P.A.*, 333 F.3d 184, 189 (D.C. Cir. 2003) ("[T]he courts of appeals have consistently held that the express listing of specific EPA actions in section 1369(b)(1) precludes direct appellate review of those actions not so specified."); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("It would be an odd use of language to say 'any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title' in § 1369(b)(1)(E) if the references to particular sections were not meant to exclude others.").

The Agencies' response to this textual point is underwhelming, raising suppositional and policy arguments. First, the Agencies contend that they promulgated the Clean Water Rule *only* under the *effluent limitations* provision codified at § 1311. Section 1311 makes the unauthorized "discharge of any pollutant by any person . . . unlawful." § 1311(a). The phrase "discharge of any pollutant" is defined, as pertinent here, as "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A). The Agencies concede that "[t]he plain text reading of the phrase 'other limitation under sections 1311, 1312, 1316, or 1345' . . . *can only refer*

to limitations that are promulgated under the specified sections but are not effluent limitations." (Emphasis added.) They then suppose in circular fashion that "[b]y defining what waters are 'waters of the United States,' the Clean Water Rule establishes where the Act's prohibitions and requirements apply."

This may be true, but it fails muster on the point of whether the Clean Water Rule is any "other limitation" within the meaning of § 1311. Importantly, neither the Agencies nor the lead opinion have identified a specified subsection within § 1311 that are "not effluent limitations" under which the Agencies promulgated the Clean Water Rule. This is because they cannot. Waters of the United States applies across the Act, not just to those discharge limitations set forth in § 1311. The Clean Water Rule is not a "limitation" on the discharge of pollutants *into* waters of the United States; rather, it sets the jurisdictional reach for whether the discharge limitations even apply in the first place. In the Agencies' own words:

> The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,102 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401). In short, I refuse to read § 1369's narrow jurisdictional authorization in such a circular

fashion, expansively turning the broadening of the Act's jurisdiction into a limitation that may be imposed *only when jurisdiction is appropriate. Cf. North Dakota v. U.S. E.P.A.*, —F. Supp. 3d—, 2015 WL 5060744, at *2 (D.N.D. Aug. 27, 2015) ("[T]he States have exactly the same discretion to dispose of pollutants into the waters of the United States after the Rule as before.").

Second, the Agencies raise policy considerations as to why review of such a nationally important rule should originate in the courts of appeals. They argue, for example, that the definition of waters of the United States is a "fundamental" and "basic regulation" pertinent to the Act's backbone—its prohibition against discharging pollutants into such waters without a permit. The Agencies also argue initial review in the district courts will inevitably lead to waste of judicial and party resources, delays, and possibly even different results.

However, no matter how important a policy prerogative may be, the Act's plain and unambiguous text binds this court. That text stands in marked contrast to the Clean Air Act's express authorization to challenge "any other nationally applicable regulations" by the EPA in the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1); *Am. Paper Inst.*, 890 F.2d at 877 ("Congress could easily have provided jurisdiction . . . by providing a general jurisdiction provision in the Act. Instead, Congress specified those EPA activities that were directly reviewable by the court of appeals.") (internal citation omitted). And that text makes clear that this court does not have jurisdiction to hear a challenge to a regulation that does not impose any limitation as set forth by the Act.

The lead opinion departs from the Act's plain text by relying on a string of cases it contends encourages a function-over-form approach to subsection (E). *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), we are told, broadly interprets the Act's jurisdictional authorization to prevent the "truly perverse situation" where the courts of appeals review actions issuing or denying permits, but not the "basic regulations governing those individual actions." I agree that *E.I. du Pont* speaks to such policy considerations, but disagree that such policy considerations drove the Court's analysis.

In *E.I. du Pont*, the Supreme Court considered effluent limitation regulations promulgated by the EPA for discharges by the inorganic chemical industry. *Id.* at 122–24. The primary issue was whether the Act granted the EPA the power to set effluent limitations by regulation (thereby falling within subsection (E)) or by guideline (thereby falling outside subsection (E)). *Id.* at 124–25. "Thus the issue of jurisdiction to review the regulations [was] intertwined with the issue of [the] EPA's power to issue the regulations." *Id.* at 125. After resolving the "critical question [of] whether [the] EPA has the power to issue effluent limitations by regulation" in the EPA's favor based on the statute's text and legislative history, *id.* at 124, 126–36, the Court plainly noted that its holding that the Act "authorize[d] the [EPA] to promulgate effluent limitations [by regulation] for classes and categories of existing point sources *necessarily resolve[d] the jurisdictional issue* as well." *Id.* at 136 (emphasis added).

Yet, the lead opinion draws its "functional" "lens" from *E.I. du Pont*'s subsequent discussion as to why it rejected the industry's argument that subsection

(E)'s reference to § 1311 (the effluent limitations provision) "was intended only to provide for review of the grant or denial of an individual variance" from the Act's effluent limitations restriction. *Id.* Among other reasons, the Court found this argument unpersuasive because the industry's "construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits . . . but would have no power of direct review of the basic regulations governing those individual actions." *Id.* This policy reason came *after* a plain textual rejection of the industry's position. *Id.* It is, therefore, a far stretch to take this dicta and expand it as the lead opinion does to find jurisdiction proper when a regulation's "practical effect" only sets forth "indirect" limits. And, unlike in *E.I du Pont*, the Agencies here admit they have not promulgated an effluent limitation. I therefore decline to read *E.I. du Pont*, as the lead opinion does, as shoehorning an exercise in jurisdictional line-drawing into subsection (E)'s "other limitation" provision.

To the extent policy considerations are responsible for *E.I. du Pont*'s outcome, I disagree that, to borrow the lead opinion's phrase, such "real world" considerations mandate a watered-down version of textualism in this case, erroneously elevating the perceived congressional purpose over the statutory language. As the Supreme Court emphasized just last year, "[o]ur job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'" *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) (citation omitted). Thus, when presented with "the clear meaning of the text, there is no need to . . . consult the [statute's] purpose. . . .

[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167–68 (2004) (citation omitted and second alteration in original). Put differently, unambiguous text trumps policy considerations. *See Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text."); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012) ("[N]o legislation pursues its purposes at all costs, and petitioners' purposive argument simply cannot overcome the force of the plain text.") (internal citation omitted); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration."). As set forth, subsection (E)'s language could not be clearer, thus removing policy considerations from this court's analytical quiver.

Circuit case law drawing on this "functional approach" similarly misses the mark. Notably, *VEPCO* appears to define "limitation" as "a restriction on the untrammeled discretion of the industry which was the condition prior to the [Act's] passage." 566 F.2d at 450. Other cases relied upon by the lead opinion have followed this analysis. *See, e.g., Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844, 866 (8th Cir. 2013); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 673 F.2d 400, 405 (D.C. Cir. 1982) ("*NRDC II*"). However, *VEPCO*'s statement requires context.

The regulation at issue in *VEPCO* governed the "structures used to withdraw water for cooling purposes." 566 F.2d at 446–51. It did "not impose specif-

ic structural or locational requirements upon cooling water intake structures," and instead just "require[d] that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." *Id.* at 450. Because the regulation mandated the consideration of certain information in constructing intake structures, the Fourth Circuit reasoned, that "in itself [was] a limitation on point sources and permit issuers" and therefore restricted "the untrammeled discretion of the industry." *VEPCO* also drew from *E.I. du Pont*, reasoning that the regulation issued there was "so closely related to the effluent limitations and new source standards of performance . . . that . . . it would be anomalous to have their review bifurcated between different courts." *Id.* (*citing E.I. du Pont*, 430 U.S. at 136).

At most, *VEPCO* is an example of what constitutes an "other limitation"—a restriction on the industry's abilities to intrude upon the waters of the United States without the Agencies' permission to do so. In this regard, the Fourth Circuit's "untrammeled discretion" language makes absolute sense, but I disagree with the lead opinion's reliance upon this language here. The *Act* in and of itself restricts the industry's untrammeled discretion. I see no textual indication that Congress intended *any* restriction on the industry to be directly reviewed by the courts of appeals, yet under the lead opinion's reading, *any* industry restriction requires review here. The lead opinion's application thus swallows the rule.

Finally, that the Clean Water Rule arguably expands the Act's jurisdiction cannot be a reason to

find a functional limitation under subsection (E). The lead opinion hangs its "functional" premise on the fact that the Clean Water Rule is a "basic regulation" affecting the Act's core, defining where it applies and where it does not. It presumes, perhaps rightly so, that the Clean Water Rule "results in [an] expansion of regulatory authority in some instances and impos[es] . . . additional restrictions on the activities of some property owners." However, I cannot agree that the latter supports the former in concluding that the Clean Water Rule "has the *indirect* effect of altering permit issuers' authority to restrict point-source operators' discharges into covered waters." A plausible hypothetical removes the linchpin in this analysis. Suppose instead of taking a flow-like approach to the Act's jurisdiction, the Agencies—perhaps under a different administration—promulgate a rule that ebbs toward a more restricted view, consistent with the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Under the lead opinion's analysis, a rule *narrowing* the scope of the waters of the United States would *also* be an "other limitation" sufficient to trigger our jurisdiction because it too would indirectly affect point-source operators and permit issuing authorities, albeit in a less restrictive manner. Congress could not have intended such a nonsensical result.

For these reasons, I cannot conclude that subsection (E) authorizes our jurisdiction.

III.

Second, the lead opinion concludes we have jurisdiction to hear petitioners' challenges under subsection (F). I agree, but for different reasons. Specifically, while I agree that *National Cotton* controls

this court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking. I therefore concur in the judgment, only.

Section 1369(b)(1)(F) provides exclusive jurisdiction in this court to review an action "issuing or denying any permit under section 1342, [the National Pollutant Discharge Elimination System ("NPDES")]." On its face, subsection (F) clearly does not apply to the Clean Water Rule's promulgation. *See Rhode Island v. U.S. E.P.A.*, 378 F.3d 19, 23 (1st Cir. 2004) ("By its plain terms, [subsection (F)] conditions the availability of judicial review on the issuance or denial of a permit."). Under a plain text reading, the Clean Water Rule neither issues nor denies a permit under the NPDES. In my view, this should end the analysis. I am, however, constrained by our court's precedent holding that "issuing or denying any permit" means more than just that.

As the lead opinion correctly notes, several courts have deviated from a strict reading of the jurisdictional language and toward a more "functional" approach. In *Crown Simpson Pulp Company v. Costle*, for example, the Supreme Court blessed jurisdiction in the courts of appeals when the EPA's action—there, vetoing California's proposal to grant permits for pulp mills to discharge pollutants into the Pacific Ocean—had the "precise effect" of denying a permit. 445 U.S. 193, 196 (1980). In other words, jurisdiction was proper because the EPA's action was "functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program." *Id.* A contrary ruling, held the Supreme Court, would lead to an "irrational bifurcated system" depending upon "the fortuitous cir-

cumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196–97. Both the D.C. Circuit, *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 656 F.2d 768, 776 (D.C. Cir. 1981) ("*NRDC I*"); *NRDC II*, 673 F.2d at 405 (then-Judge Ginsburg's "practical rather than a cramped construction" counsel), and the Ninth Circuit, *Am. Mining Congress v. U.S. E.P.A.*, 965 F.2d 759 (9th Cir. 1992), *Nat. Res. Def. Council, Inc., v. U.S. E.P.A.*, 966 F.2d 1292, 1297 (9th Cir. 1992) ("*NRDC III*"), *Nat. Res. Def. Council v. U.S. E.P.A.*, 526 F.3d 591, 601 (9th Cir. 2008) ("*NRDC IV*"), have similarly adopted a functional approach to jurisdiction under subsection (F).

I depart ways with the lead opinion at the breadth with which it reads *Crown Simpson*. As the Ninth Circuit made clear in *Northwest Environmental Advocates v. U.S. E.P.A.*, "[t]he facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense." 537 F.3d 1006, 1016 (9th Cir. 2008). The Supreme Court was clearly concerned with a rigid construction of "issuing or denying" given the factual circumstances of *Crown Simpson*—*i.e.*, had the EPA not delegated California the authority to designate NPDES permits, it would have had the power to grant or deny permits directly (thus explaining the "perverse" result rationale). With this factual overlay, the Court's "precise effect" exception makes sense.

That exception simply does not apply here. We have underscored that the text matters when interpreting the jurisdictional grant of § 1369(b)(1). *See Lake Cumberland Trust, Inc. v. U.S. E.P.A.*, 954 F.2d 1218, 1221–24 (6th Cir. 1992) (noting the textual distinctions between subsections (E) and (G) to find no

jurisdiction). It is also not lost on me that *National Cotton* itself purported to accentuate § 1369(b)(1)'s narrowness. 553 F.3d at 933 ("Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act."). It stretches the plain text of subsection (F) to its breaking point to hold that a definition setting the Act's boundaries has, under *Crown Simpson*, the "precise effect" of or is "functionally similar" to, approving or denying a NPDES permit. At best, the Clean Water Rule is one step removed from the permitting process. It informs whether the Act requires a permit in the first place, not whether the Agencies can (or will) issue or deny a permit.

Two other points buttress my problem with jurisdiction here. First, the Clean Water Rule applies across the entire Act, and not just with respect to the NPDES permitting process. This is particularly true when considering the fact that the Clean Water Rule's expansive definition also applies to the provision of the Act—§ 1344—requiring the Corps to issue permits for dredged or fill material. Section 1344, however, is not mentioned in subsection (F), only § 1342 is. Second, the Agencies' own argument as to why they contend the Clean Water Rule constitutes "issuing or denying any permit" shows why there are problems with extending jurisdiction to cover the Clean Water Rule. By suggesting that the Clean Water Rule identifies what waters will and will not require permitting under NPDES, they have therefore identified situations—*i.e.*, not waters of the United States—where there would never be permit decisions in the first place to be reviewed by the courts of appeals. *See Nw. Envtl. Advocates*, 537

F.3d at 1018; *Friends of the Everglades*, 699 F.3d at 1288.

Although not bound by *Crown Simpson* and the other cases cited by the lead opinion, *National Cotton* dictates my conclusion. There, we extended jurisdiction under subsection (F) when a rule "regulates the permitting procedures." 553 F.3d at 933. At issue in *National Cotton* was an EPA rule exempting certain pesticides from the NPDES permitting requirements. *Id.* at 929. In expanding subsection (F)'s jurisdictional authorization, our court relied upon statements by the Ninth Circuit in *American Mining Congress* and *NRDC III* extending jurisdictional review from the "issuance or denial of a particular permit" to "the regulations governing the issuance of permits" and the "rules that regulate the underlying permit procedures." *Id.* at 933 (citations omitted).

National Cotton's jurisdictional reach, in my view, has no end. Indeed, the lead opinion even acknowledges that *National Cotton* holds "a regulation that imposes no restriction or limitation is reviewable in circuit court, so long as it affects permitting requirements." It is a broad authorization to the courts of appeals to review *anything* relating to permitting notwithstanding the statutory language to the contrary.

Moreover, the Ninth Circuit has subsequently rolled back the two cases relied upon by *National Cotton* to broadly interpret subsection (F), *American Mining Congress* and *NRDC III*. *See Nw. Envtl. Advocates*, 537 F.3d at 1018. It also drew a line between statutory exemptions and permitting procedures, noting that a regulation granting a statutory exemption necessarily meant that the courts of ap-

peals would "never have to consider on direct review an action involving the denial of an NPDES permit for pollutant discharges" and thus there was no danger of the "awkward[]" and bifurcated review problem described in *NRDC I*. *Id.* at 1018 (citation omitted). The Eleventh Circuit, sitting *en banc*, has also taken this tack. *See Friends of the Everglades*, 699 F.3d at 1288. It also directly criticized *National Cotton* for expanding subsection (F) to apply to any "regulations relating to permitting itself." *Id.*

The lead opinion distinguishes *Northwest Environmental Advocates* and *Friends of the Everglades*, noting that those cases addressed permitting *exemptions*. But so too did *National Cotton*. In my view, the Ninth and Eleventh Circuit's commentary regarding *National Cotton* and its undergirdings have merit, especially considering subsection (F)'s plain text and the factually narrow circumstances of *Crown Simpson* and *E.I. du Pont*. These same reasons lead me to conclude the lead opinion's reliance on a non-Clean Water Act case to support its policy arguments, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), is unavailing.

Taking *National Cotton*'s holding, as I must, there is a better way to reconcile these authorities: Permitting decisions under NPDES and exempting a certain action from the NPDES permitting process are functionally the same because both allow persons to discharge pollutants into the waters of the United States. Such actions, therefore, are reviewable under subsection (F). That is not what we have here. The Clean Water Rule presents neither a permitting exemption (*National Cotton*) nor similar functional equivalency (*Crown Simpson*) that any court has ap-

proved to find jurisdiction proper under subsection (F).

However, *National Cotton* goes further than just finding jurisdiction in cases involving permitting exemptions, and expands jurisdiction to review any regulation "governing" permits. 553 F.3d at 933. Although, in my view, the holding in *National Cotton* is incorrect, this panel is without authority to overrule it. *See Bennett v. MIS Corp.*, 607 F.3d 1076, 1095 (6th Cir. 2010) ("It is a well-established rule in this Circuit that a panel of this court may not overrule a prior published opinion of our court absent en banc review or an intervening and binding change in the state of the law.").[2] Here, the Clean Water Rule defines what waters necessarily require permits, and therefore is undoubtedly a "regulation[] governing the issuance of permits under section 402 [33 U.S.C. § 1342]." *National Cotton*, 553 F.3d at 933. Under this binding authority, the lead opinion properly concludes jurisdiction rests before us under subsection (F).

For these reasons, I concur in the judgment, only.

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[2] That this action is before us upon consolidation by the Judicial Panel on Multidistrict Litigation does not change this result, for we are to apply our law absent an indication that it is "unique" and "arguably divergent from the predominant interpretation of . . . federal law." *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 911 n.17 (6th Cir. 2003). Although I disagree with *National Cotton*, I cannot conclude that it is unique and diverges from the predominant view of the other circuits.

IV.

In sum, I am compelled to find jurisdiction is proper pursuant to *National Cotton*. Absent *National Cotton*, I would dismiss the petitions for lack of jurisdiction.

DISSENT

KEITH, *Circuit Judge*, dissenting. I agree with Judge Griffin's reasoning and conclusion that, under the plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C. § 1369(b)(1) confers original jurisdiction on the appellate courts. Like Judge Griffin, I disagree with Judge McKeague. Nevertheless, Judge Griffin concludes that original jurisdiction lies in the appellate courts under this court's opinion in *National Cotton Council of Am. v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009). I believe Judge Griffin's reading of that case is wrong.

In *National Cotton*, this court concluded that it had original jurisdiction to review a rule that created exemptions to the permitting procedures of the Clean Water Act (the "Act"). 553 F.3d at 933. In holding that jurisdiction was proper, the court reasoned that "[t]he jurisdictional grant of [subsection (F)] authorizes the court of appeals 'to review the regulations governing the issuance of permits . . . as well as the issuance or denial of a particular permit.'" *Id.* at 933 (quoting *Am. Mining Cong. v. U.S. EPA*, 965 F.2d 759, 763 (9th Cir. 1992)). Therefore, the court expanded subsection (F) to cover rules that "regulate[] the permitting procedures." *See id.*; *cf.* 33 U.S.C. § 1369(b)(1)(F) (relating to administrative actions

that "issu[e] or deny[] any permit under section 1342"). I view this limited expansion of subsection (F) as the holding of *National Cotton*.

By contrast, Judge Griffin contends that *National Cotton*'s holding expanded the scope of subsection (F) to include anything "relating" to permitting procedures. While *National Cotton* expanded the scope of subsection (F) to cover rules "*regulating*" or "*governing*" permitting procedures, 553 F.3d at 933, it did not expand that subsection to cover all rules "*relating*" to those procedures, such as the one at issue here—a rule that merely defines the scope of the term "waters of the United States." That a rule "relates" to a permitting procedure does not mean that it "regulates" or "governs" that procedure. Therein lies the analytical fallacy in the concurrence. Simply put, it cannot be that any rule that merely "relates" to permitting procedures—however tenuous, minimal, or tangential that relation may be—confers original jurisdiction upon this court under subsection (F). This could not have been the intent of the legislators who drafted seven carefully defined bases for original jurisdiction in the appellate courts—and it could not have been the intent of the *National Cotton* court itself.

Admittedly, the *National Cotton* court could have provided an explanation of what it meant by "regulations governing the issuance of permits." *See* 553 F.3d at 933. By not explaining this phrase, it invited much speculation about the scope of subsection (F). For example, the Eleventh Circuit in *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012), declined to extend the rationale and holding of *National Cotton* because this court failed to provide a better explanation of its reasoning. However, *Na-*

tional Cotton's failure to define this phrase does not mean that this phrase must encompass everything. I am reluctant to read *National Cotton* in a way that expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion.

In sum, *National Cotton*'s holding is not as elastic as the concurrence suggests. If this court construes that holding to be so broad as to cover the facts of this case, that construction brings subsection (F) to its breaking point: a foreseeable consequence of the concurrence's reasoning is that this court would exercise original subject-matter jurisdiction over all things related to the Clean Water Act. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED. REG. 37,054 (JUNE 29, 2015).

MURRAY ENERGY CORPORATION (15-3751); STATE OF OHIO, ET AL. (15-3799); NATIONAL WILDLIFE FEDERATION (15-3817); NATURAL RESOURCES DEFENSE COUNCIL, INC. (15-3820); STATE OF OKLAHOMA (15-3822); CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL. (15-3823); STATE OF NORTH DAKOTA, ET AL. (15-3831); WATERKEEPER ALLIANCE INC., ET AL. (15-3837); PUGET SOUNDKEEPER ALLIANCE, ET AL. (15-3839); AMERICAN FARM BUREAU FEDERATION, ET AL. (15-3850); STATE OF TEXAS, ET AL. (15-3853); UTILITY WATER ACT GROUP (15-3858); SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL. (15-3885); STATE OF GEORGIA, ET AL. (15-3887); ONE HUNDRED MILES, ET AL. (15-3948); SOUTHEAST STORMWATER ASSOCIATION, INC., ET AL. (15-4159); MICHIGAN FARM BUREAU (15-4162); WASHINGTON CATTLEMEN'S ASSOCIATION (15-4188); ASSOCIATION OF AMERICAN RAILROADS, ET AL. (15-4211); TEXAS ALLIANCE FOR RESPONSIBLE GROWTH, ENVIRONMENT, AND TRANSPORTATION (15-4234); AMERICAN EXPLORATION & MINING ASSOCIATION (15-4305); ARIZONA MINING ASSOCIATION, ET AL. (15-4404),

Petitioners,

v.

UNITED STATES DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

Nos. 15-3751 /3799/ 3817/
3820/ 3822/ 3823/ 3831/
3837/ 3839/ 3850/ 3853/ 3858/
3885/ 3887/ 3948/4159/ 4162/
4188/ 4211/ 4234/ 4305/ 4404

[Filed February 22, 2016]

Before: KEITH, McKEAGUE, and GRIFFIN, *Circuit Judges*.

JUDGMENT

On Petitions for Review of Final Rule of the United States Department of Defense and United States Environmental Protection Agency. Judicial Panel on Multi-District Litigation, No. 135.

THIS MATTER came before the court upon the petitions for review by Petitioners and Intervenors for review of the Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

UPON FULL REVIEW of the record, the motions to dismiss, and arguments of counsel,

IT IS ORDERED, for the reasons more fully set forth in the court's opinions of even date, that all pending motions to dismiss are DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Nos. 15-3751 /3799/ 3817/
3820/ 3822/ 3823/ 3831/
3837/ 3839/ 3850/ 3853/ 3858/
3885/ 3887/ 3948/ 4159/ 4162/
4188/ 4211/ 4234/ 4305/ 4404

[Filed April 21, 2016]

Before: KEITH, McKEAGUE, and GRIFFIN, *Circuit Judges.*

The court received six petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied. Judge Keith would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX D

STATUTES INVOLVED

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33 U.S.C. § 1369

§ 1369. Administrative procedure and judicial review

* * * * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * * * *

AND
BRIEFS

No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
J. DAVID GUNTER II
ROBERT J. LUNDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under 33 U.S.C. 1369(b)(1) over a petition for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act.

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In the Supreme Court of the United States

No. 16-299

NATIONAL ASSOCIATION OF MANUFACTURERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 817 F.3d 261.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2016. A petition for rehearing was denied on April 21, 2016 (Pet. App. 51a-52a). On July 1, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 2, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to "restore and maintain the chemical, physical, and biological integrity of

the Nation's waters." 33 U.S.C. 1251(a). To serve that goal, the CWA prohibits "the discharge of any pollutant by any person," except in compliance with the Act's various provisions, which include effluent-limitation restrictions and permitting programs. 33 U.S.C. 1311(a). The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The term "navigable waters," in turn, is defined to mean "the waters of the United States." 33 U.S.C. 1362(7).

The CWA establishes two major permitting programs to regulate the discharge of pollutants into the waters of the United States. First, the National Pollutant Discharge Elimination System (NPDES) program authorizes the Environmental Protection Agency (EPA) or a qualifying State to "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title." 33 U.S.C. 1342(a)(1) and (b). NPDES permits generally control point-source discharges into waters of the United States by establishing permissible rates, concentrations, quantities of specified constituents, or other limitations and conditions as appropriate. See 33 U.S.C. 1342(a)(1) and (2); see generally 40 C.F.R. 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000). Second, the Act authorizes the United States Army Corps of Engineers (the Corps) to issue permits "for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. 1344(a); see generally 33 C.F.R. 320-332; 40 C.F.R. 230-232; see also, *e.g.*, *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 266, 268-269 (2009).

b. "[I]mportant consequences" flow from a determination that "a particular piece of property contains waters of the United States," because such a finding defines where the CWA's various prohibitions, permitting obligations, and other restrictions apply. *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). If particular waters qualify as "waters of the United States," a person cannot discharge a pollutant into those waters from a point source unless authorized by a CWA permit or exempted by the Act. See 33 U.S.C. 1311(a), 1362(7) and (12)(A). If the waters are not "waters of the United States," no permit is required. The meaning of the term "waters of the United States" thus plays a central role in defining the reach of the CWA's restrictions.

This Court has previously considered the scope of the term "waters of the United States." See *Rapanos* v. *United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Most recently, in *Rapanos*, the Court vacated a ruling that particular wetlands qualified as such waters. 547 U.S. at 757. Although all Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense, no opinion gained the support of a majority of the Court. See *id.* at 732, 742 (plurality opinion) (focusing on whether waters are "relatively permanent, standing or flowing," or have "a continuous surface connection" to such waters); *id.* at 779-780 (Kennedy, J., concurring in the judgment) (focusing on whether waters have a "significant nexus" to traditional navigable waters by significantly affecting their

chemical, physical, or biological integrity). Several Members of the Court have urged Congress or the agencies to "clarif[y] * * * the reach of the [CWA]" by adopting a statutory or regulatory definition of the term "waters of the United States." *Sackett* v. *EPA*, 132 S. Ct. 1367, 1376 (2012) (Alito, J., concurring); see *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); *id.* at 811-812 (Breyer, J., dissenting).

In 2015, EPA and the Corps promulgated the Clean Water Rule to clarify the meaning of the term "waters of the United States." See 80 Fed. Reg. 37,054 (June 29, 2015). The Rule "reflects the agencies' goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA." *Id.* at 37,057. The Rule "define[s] 'waters of the United States' to include eight categories of jurisdictional waters." *Ibid.* The Rule further "maintains existing exclusions for certain categories of waters, and adds additional categorical exclusions that are regularly applied in practice." *Ibid.* In defining the term "waters of the United States," the agencies relied on "the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute" for more than 40 years. *Id.* at 37,055. The agencies specified that the rule was issued under the legal authority provided by the CWA, including, *inter alia*, 33 U.S.C. 1311 and 1342. 80 Fed. Reg. at 37,055.

c. To "establish a clear and orderly process for judicial review," the CWA vests federal courts of appeals with exclusive original jurisdiction to review certain categories of EPA decisions implementing the Act. H.R. Rep. No. 911, 92d Cong., 2d Sess. 136 (1972)

(House Report); see S. Rep. No. 414, 92d Cong., 2d Sess. 85 (1971) (noting the need for "even and consistent" application of nationwide administrative actions). As relevant here, the courts of appeals have original jurisdiction over petitions for review of EPA actions

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title[.]

33 U.S.C. 1369(b)(1)(E) and (F).

Petitions for review pursuant to Section 1369(b) generally must be filed within 120 days after the challenged agency action. 33 U.S.C. 1369(b). When multiple petitions for review are filed to challenge a single action, those petitions are consolidated before one court of appeals, chosen randomly from the circuits in which petitions were filed in the first ten days, to avoid forum shopping and the potential for conflicting decisions. 28 U.S.C. 2112(a)(3); see H.R. Rep. No. 72, 100th Cong., 1st Sess. 2 (1987). Any agency action "with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2); see *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). Section 1369(b) thereby promotes the ability of regulators, the regulated community, and the public to rely on the validity of agency actions that are not promptly challenged or that are upheld by a court of appeals.

Final agency action that is reviewable under general principles of administrative law, but that falls outside the categories enumerated in Section 1369(b)(1),

may generally be challenged in federal district court under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 5 U.S.C. 704. An APA suit may be brought at any time within six years after the date of the challenged agency action. 28 U.S.C. 2401(a).

2. Shortly after the Clean Water Rule was promulgated, multiple petitions for review of the Rule were filed pursuant to Section 1369(b)(1) and consolidated in the Sixth Circuit. Pet. App. 3a. In October 2015, the Sixth Circuit issued a nationwide stay of the Rule pending the court's consideration of the Rule's validity. *Id.* at 5a. Petitioner intervened in the consolidated cases and filed a motion to dismiss, contending that the court of appeals lacked jurisdiction to consider the Rule under Section 1369(b)(1). The court of appeals denied petitioner's motion to dismiss. *Id.* at 2a-45a.

a. Judge McKeague, who announced the court's judgment in the lead opinion, concluded that two provisions of Section 1369(b)(1) authorized direct review of the Clean Water Rule in the courts of appeals. Pet. App. 3a-26a.

First, Judge McKeague found the Rule reviewable under Section 1369(b)(1)(E), which applies to "effluent limitation[s] or other limitation[s] under section 1311, 1312, 1316, or 1345" of Title 33. 33 U.S.C. 1369(b)(1)(E). Judge McKeague concluded that the Rule qualified as an "other limitation" because it expands "regulatory authority in some instances" through the clarified definition of "waters of the United States," and thereby "impos[es] * * * additional restrictions on the activities of some property owners" and "alter[s] permit issuers' authority to restrict point-source operators' discharges into covered waters." Pet. App. 15a. Judge McKeague further observed that, for purposes of Sec-

tion 1369(b)(1)(E), the Clean Water Rule imposes limitations "under section 1311" because EPA had relied in part on Section 1311 as a source of authority to promulgate the Rule. *Id.* at 15a n.4. Judge McKeague stated that a contrary jurisdictional ruling "would produce * * * 'a truly perverse situation'" because it would imply that "Congress intended to provide direct circuit court review of * * * individual actions" in issuing or denying permits under the NPDES program, "but intended to exclude from such review the definitional Rule on which the process is based." *Id.* at 15a (quoting *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977)).

Second, Judge McKeague concluded that jurisdiction exists to consider the Clean Water Rule under Section 1369(b)(1)(F), which authorizes review of EPA action "in issuing or denying any permit" under the NPDES program, 33 U.S.C. 1369(b)(1)(F). Pet. App. 17a-24a. Judge McKeague observed that, in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-197 (1980) (*Crown Simpson*) (per curiam), this Court had rejected a "strict literal application" of Section 1369(b)(1)(F), instead interpreting the statute to encompass agency action that is "functionally similar" to the issuance or denial of a permit. Pet. App. 17a (quoting *Crown Simpson*, 445 U.S. at 196). Judge McKeague further relied on a Sixth Circuit decision that had followed the analysis in *Crown Simpson* and had held that Section 1369(b)(1)(F) "authorizes direct circuit court review not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits." *Id.* at 18a (citing *National Cotton Council of Am.* v. *United States EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (*National*

Cotton), cert. denied, 559 U.S. 936, and 130 S. Ct. 1505 (2010)). Because he found that the Clean Water Rule "indisputably expands regulatory authority and impacts the granting and denying of permits in fundamental ways," Judge McKeague concluded that the Rule was reviewable pursuant to Section 1369(b)(1)(F). *Id.* at 21a.

b. Judge Griffin concurred in the judgment. Pet. App. 27a-45a. He agreed that, under the interpretation of Section 1369(b)(1)(F) that the Sixth Circuit had adopted in *National Cotton*, that provision authorized review of the Clean Water Rule because the "Rule defines what waters necessarily require permits, and therefore is undoubtedly a 'regulation[] governing the issuance of permits under section 402 [33 U.S.C. § 1342].'" *Id.* at 44a (quoting *National Cotton*, 553 F.3d at 933). Although Judge Griffin disagreed with *National Cotton*, he found it controlling and consistent with "the predominant view of the other circuits." *Id.* at 44a n.2.

Judge Griffin did not believe that Section 1369(b)(1)(E) authorized review of the Clean Water Rule. Pet. App. 29a-38a. In his view, the Rule did not qualify as an "other limitation" within the meaning of that provision because the Rule interprets a term in the Act's definitional section, 33 U.S.C. 1362, and "sets the jurisdictional reach for whether the discharge limitations even apply in the first place." Pet. App. 31a-32a.

c. Judge Keith dissented. Pet. App. 45a-47a. He did not view *National Cotton* as controlling and would have held that the Clean Water Rule fell outside the jurisdiction conferred by Section 1369(b)(1)(E) and (F). *Ibid.*

d. Under the schedule set by the Sixth Circuit, briefing on the merits of the challenges to the Clean Water Rule will be completed in March 2017. The Sixth Circuit has specified that oral argument will be scheduled "as soon as practicable after the briefing is complete." C.A. Doc. 125, at 2 (Oct. 25, 2016).

3. Petitioner and other parties have filed numerous APA challenges to the Clean Water Rule in district courts throughout the country. See Pet. 8 nn.1 & 2. The courts in most of those cases have stayed the proceedings, held the cases in abeyance, or dismissed the suits without prejudice while the Sixth Circuit considers the challenges to the Clean Water Rule.

Five district courts have concluded that they lack jurisdiction to review the Clean Water Rule because exclusive jurisdiction is vested in the courts of appeals pursuant to Section 1369(b)(1). See *Washington Cattlemen's Ass'n* v. *United States EPA*, No. 15-3058, 2016 WL 6645765, at *3 (D. Minn. Nov. 8, 2016); *Ohio* v. *EPA*, 15-cv-02467 Docket entry No. 54, at 1 (S.D. Ohio Apr. 25, 2016); *Oklahoma ex rel. Pruitt* v. *United States EPA*, No. 15-cv-0381, 2016 WL 3189807, at *2 (N.D. Okla. Feb. 24, 2016); *Georgia* v. *McCarthy*, No. CV 215-79, 2015 WL 5092568, at *1 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp.* v. *United States EPA*, No. 15CV110, 2015 WL 5062506, at *1 (N.D. W. Va. Aug. 26, 2015). To date, three of those decisions have been appealed. The Sixth Circuit stayed the case filed in the Southern District of Ohio pending its merits decision in this case. *Ohio* v. *EPA*, 16-3564 Doc. 13, at 1 (July 1, 2016). The Eleventh Circuit likewise stayed the case filed in the Southern District of Georgia, reasoning that "[i]t would be a colossal waste of judicial resources" to consider the case before the Sixth

Circuit adjudicated the merits of the Clean Water Rule. *Georgia* v. *McCarthy*, 833 F.3d 1317, 1321 (2016). The Tenth Circuit recently heard oral argument on the jurisdictional question in the case on appeal from the Northern District of Oklahoma. See *Chamber of Commerce of the U.S.* v. *EPA*, No. 16-5038 (argued Nov. 17, 2016).

Before the Sixth Circuit issued its jurisdictional ruling in this case, one district court had asserted jurisdiction over an APA challenge to the Clean Water Rule. See *North Dakota* v. *U.S. EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015). Following the Sixth Circuit's ruling, however, that district court noted that it was "unclear whether [it] continues to retain jurisdiction," and the court stayed the proceedings pending any further decision by the courts of appeals or this Court. *North Dakota* v. *U.S. EPA*, 15-cv-59 Docket entry No. 156, at 3 (D.N.D. May 24, 2016).

To date, no briefing on the merits has occurred or been scheduled in any of the district court cases.

ARGUMENT

The court of appeals correctly held that Section 1369(b)(1) vests it with original jurisdiction to consider the validity of the Clean Water Rule. That conclusion is consistent with this Court's precedents, the decisions of other court of appeals, and Congress's purpose in authorizing direct court of appeals review. And, under this Court's established practices, the interlocutory posture of the case provides an additional reason to deny certiorari. Further review is not warranted.

1. Petitioner contends (Pet. 14-20) that Section 1369(b)(1) does not confer jurisdiction on the court of appeals to review the Clean Water Rule. That argu-

ment lacks merit. As Judge McKeague observed, jurisdiction is proper under the pragmatic construction of Section 1369(b)(1) that this Court adopted in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) (*E.I. du Pont*), and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (*Crown Simpson*) (per curiam). In both of those decisions, the Court considered the CWA's structure and objectives and concluded that Section 1369(b)(1) should be read broadly to authorize original jurisdiction in the courts of appeals of EPA actions that directly affect CWA permitting decisions. The Court recognized, in particular, that it would be highly anomalous for district courts to review overarching EPA actions having a systemic effect on the CWA permitting process, when EPA decisions on particular permit applications are reviewable only in the courts of appeals. During the ensuing decades, the approach endorsed in *E.I. du Pont* and *Crown Simpson* has governed the allocation of authority between the courts of appeals and district courts to review EPA action in administering the CWA. Because the purpose and effect of the Clean Water Rule is to identify the locations where the CWA's prohibitions apply and where permits are required, the Rule falls within the categories of agency action that are reviewable under Section 1369(b)(1)(E) and (F).

a. In *E.I. du Pont*, the Court held that EPA's effluent limitations guideline regulations were directly reviewable in the courts of appeals under Section 1369(b)(1)(E), which provides for review of EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." 33 U.S.C. 1369(b)(1)(E). The Court rejected the industry challengers' argument "that the

reference to [Section 1311] [in Section 1369(b)(1)(E)] was intended only to provide for review of the grant or denial of an individual variance pursuant to [Section 1311(c)]." 430 U.S. at 136. That narrow construction, the Court explained, would "produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section 1342] [under Section 1369(b)(1)(F)] but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.*

In *Crown Simpson*, the Court similarly relied on practical considerations to read Section 1369(b)(1) broadly. There, the Court held that Section 1369(b)(1)(F), which authorizes review of EPA actions "in issuing or denying any [NPDES] permit," extended to EPA's veto of an NPDES permit proposed by the state permitting authority. 445 U.S. at 195 (citation omitted). The Ninth Circuit had concluded that it lacked original jurisdiction because "EPA's veto of a state-issued permit did not constitute 'issuing or denying' a permit." *Id.* at 196. This Court reversed, agreeing with a concurring judge's observation that "vesting jurisdiction in the courts of appeals * * * would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions and would recognize that EPA's veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program." *Ibid.* The Court declined to read Section 1369(b)(1) as creating an "irrational bifurcated system" of review that made "denials of NPDES permits * * * reviewable at different levels of the federal-court system depending on the fortuitous circumstances

of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-197.

b. Under the interpretive approach used by this Court in *E.I. du Pont* and *Crown Simpson*, the Clean Water Rule falls within the jurisdiction conferred by Section 1369(b)(1)(E) and (F). First, the Rule constitutes EPA action "in approving or promulgating any effluent limitation or *other limitation* under section 1311." 33 U.S.C. 1369(b)(1)(E) (emphasis added). Although the Act does not define "other limitation," inclusion of that language in Section 1369(b)(1)(E) reflects an evident congressional intent to authorize direct court of appeals review of some category of "limitation[s]" that are distinct from the effluent limitations that are specifically covered. See *Virginia Elec. & Power Co.* v. *Costle*, 566 F.2d 446, 449 (4th Cir. 1977) (*VEPCO*) (explaining that, although the legislative history does not explain the intended meaning of the phrase "other limitation," the court "cannot assume that its inclusion was meaningless or inadvertent").

The Clean Water Rule qualifies as an "other limitation" because, by clarifying the scope of the statutory term "waters of the United States," the Rule triggers the Act's prohibitions on the discharge of pollutants and its permitting requirements. See, *e.g.*, *VEPCO*, 566 F.2d at 450 (interpreting the phrase "other limitation" in Section 1369(b)(1)(E) to refer broadly to any "restriction on the untrammeled discretion of the industry"). The Rule's limitations, moreover, arise in part under Section 1311, which the agencies cited as authority to issue the Rule. See 80 Fed. Reg. at 37,055. Because Section 1311(a) restricts the "discharge of any pollutant," 33 U.S.C. 1311(a), and the CWA defines that phrase to include the addition of a pollutant

to the waters of the United States, 33 U.S.C. 1362(7) and (12), the Rule's definition of the term "waters of the United States" helps to delineate the practical scope of Section 1311's prohibition on discharges.

The Clean Water Rule also is reviewable under Section 1369(b)(1)(F), which provides for review of EPA action "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F). Like the regulation at issue in *E.I. du Pont*, the Rule is a "basic regulation[] governing" individual permitting decisions because it delineates where permits are required and so sets the entire NPDES permitting scheme in motion. 430 U.S. at 136. A denial of court of appeals jurisdiction to consider the Rule "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits * * * but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.*

As this Court emphasized in *Crown Simpson*, Congress enacted Section 1369 to "ensur[e] prompt resolution of challenges to EPA's actions." 445 U.S. at 196. The Sixth Circuit's jurisdictional determination ensures that all challenges to the Clean Water Rule, which applies nationwide and is central to the implementation and enforcement of the CWA, can be resolved promptly and efficiently in a single appellate forum. The timing and mode of review that Congress prescribed in Section 1369(b) prevents the risk of prolonged uncertainty for EPA, the regulated community, and the public as to the validity of the regulatory definition of "waters of the United States," which triggers all of the Act's prohibitions and permitting obligations.

"National uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals." *Natural Res. Def. Council, Inc.* v. *U.S. EPA*, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) (*NRDC*) (R.B. Ginsburg, J.), cert. denied, 459 U.S. 879 (1982); see *VEPCO*, 566 F.2d at 451 (observing that "the jurisdictional scheme of the Act * * * in general leaves review of standards of nationwide applicability to the courts of appeals, thus furthering the aim of Congress to achieve nationally uniform standards"). Without the prompt and consolidated court of appeals review provided by Section 1369(b)(1), "several different district courts would proceed to review the NPDES-related [regulations]" over a far more extended period of time, "with the attendant risk of inconsistent decisions initially and on appeal." *NRDC*, 673 F.2d at 405 n.15; see *E.I. du Pont*, 430 U.S. at 128 n.18 (noting the "practical problems and potential for inconsistent rulings created by bifurcated review" under Section 1369(b)(1)). Each of those district courts, moreover, would be required to assess the massive administrative record, which exceeds 350,000 pages and includes detailed and technical scientific justifications for the jurisdictional lines that the Rule draws. See *E.I. du Pont*, 430 U.S. at 128 (considering it "almost inconceivable" that Congress in enacting Section 1369(b)(1) would have intended multiple courts to engage in "duplicate review" of an extensive "and highly technical" administrative record). Rather than attribute to Congress an intent to invite prolonged challenges and potentially conflicting judicial decisions regarding the validity of the Clean Water Rule, the court of appeals correctly accorded Section

1369(b)(1) a "practical rather than a cramped construction." *NRDC*, 673 F.2d at 405.

b. Petitioner's contrary arguments lack merit.

Petitioner contends (Pet. 17-18) that the Clean Water Rule does not constitute a "limitation" within the meaning of Section 1369(b)(1)(E) because it is not self-executing—that is, it restricts private conduct only in conjunction with other provisions of the Act. But because the Rule's definition of "waters of the United States" triggers the Act's prohibitions and permitting requirements, it is properly understood as a limitation under any ordinary definition of that term. Indeed, petitioner alleged in its district court complaint that the Rule "imposes impossible burdens" that its members must "comply" with, and that the Rule requires those members "either to alter their activities * * * or to obtain permits when previously they would not have had to." *American Farm Bureau Fed'n* v. *U.S. EPA*, 15-cv-165 Docket entry No. 1, at 3, 12, 14 (S.D. Tex. July 2, 2015) (Complaint).[1]

Petitioner also invokes (Pet. 18) the *ejusdem generis* canon to argue that an "other" limitation under Section 1369(b)(1)(E) must be similar to an effluent

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[1] Section 1369(b)(1) unambiguously confers jurisdiction over some agency actions whose effect on private conduct depends on their interaction with other CWA provisions. For example, regulations that establish effluent limitations are reviewable under Section 1369(b)(1)(E) even though they do not directly apply to pollutant dischargers when they are promulgated, but take effect only during the NPDES permitting process when they are used to formulate the terms of a discharger's permit. See 33 U.S.C. 1311(e); see also *Texas Oil & Gas Ass'n* v. *United States EPA*, 161 F.3d 923, 928 (5th Cir. 1998) (noting that some actions reviewable under Section 1369(b)(1)(E) "achieve their bite only after they have been incorporated into NPDES permits").

limitation. The *ejudsem generis* canon applies "[w]here general words follow an enumeration of two or more things," as "when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics." Antonin Scalia and Bryan A. Garner, *Reading Law* 199 (2012); see, *e.g.*, *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012). But Section 1369(b)(1)(E) refers only to "effluent limitations" and "other limitations," and the disjunctive "or" that separates those terms requires that they be given separate meanings. See *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014). To "give effect * * * to every word Congress used," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979), the term "other limitation" must refer to restrictions that are *not* effluent limitations.

Petitioner also asserts (Pet. 15) that Section 1369(b)(1)(F) does not confer jurisdiction because the Clean Water Rule "does not issue or deny a permit." That argument resurrects the reasoning of the Ninth Circuit that this Court rejected in *Crown Simpson*. See 445 U.S. at 196. Petitioner's attempt (Pet. 15-16) to confine *Crown Simpson* to its facts ignores this Court's analysis in the case, which emphasized "the congressional goal of ensuring prompt resolution of challenges to EPA's actions" and refused to read the statute to create an "irrational bifurcated system" of review. 445 U.S. at 196-197. Petitioner's interpretation would produce just such an irrational system. Petitioner reads the statute to require immediate direct court of appeals review of individual permitting decisions (presumably including challenges to EPA's authority to require a permit under the Rule), but to provide an extended period of district court review of

the foundational regulation that prescribes where permits must be obtained.

Contrary to petitioner's suggestion (Pet. 16-17, 19-20), the decision below does not render Section 1369(b)(1) "limitless." Pet. 19. Many EPA actions under the Act impose limitations essential to the proper operation of the NPDES permitting system or directly govern the issuance of those permits and so are reviewable under Section 1369(b)(1). But other EPA actions do not fall within Section 1369(b)(1)'s coverage. See, *e.g.*, *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012) (reviewing case originating in district court that challenged an administrative compliance order issued under Section 1319(a)); *American Farm Bureau Fed'n* v. *United States EPA*, 792 F.3d 281 (3d Cir. 2015) (reviewing case originating in district court that challenged total maximum daily loads promulgated under Section 1313), cert. denied, 136 S. Ct. 1246 (2016). The Sixth Circuit's pragmatic construction of the statute respects this Court's precedents and fulfills the Act's purposes without "turn[ing] [Section 1369(b)(1)] into a comprehensive review provision that Congress did not intend it to be." *NRDC*, 673 F.2d at 404 n.14.

Petitioner's policy arguments (Pet. 28-31) also lack merit. Petitioner contends (Pet. 29-30) that, because APA review in the district courts may generate multiple decisions on the Rule's validity and potentially produce a circuit split, that approach will "increase the possibility of a correct disposition" and "tee up issues more thoroughly for this Court's consideration." Pet. 30 (citation and internal quotation marks omitted). But Congress made a different judgment in enacting Section 1369(b)(1). By providing for direct court of appeals review on an expedited timeline, Congress

sought to "establish a clear and orderly process for judicial review" that would prevent the extended uncertainty and risk of conflicting judicial decisions that petitioner embraces. House Report 136.

2. Contrary to petitioner's contention (Pet. 20-24), the decision below does not conflict with any decision of another court of appeals. Petitioner cites decisions that considered whether Section 1369(b)(1) authorized direct court of appeals review of EPA determinations that particular activities fell *outside* the CWA's coverage. The Clean Water Rule, by contrast, defines the waters of the United States that are subject to the Act's limitations and permitting obligations. Petitioner identifies no court of appeals decision that has found Section 1369(b)(1) inapplicable to a regulation with that effect.[2]

a. In accordance with this Court's decisions in *E.I. du Pont* and *Crown Simpson*, the courts of appeals have consistently interpreted Section 1369(b)(1) to authorize review of final EPA action that imposes "a limitation on point sources and permit issuers" and "restrict[s] * * * the untrammeled discretion of the industry." *VEPCO*, 566 F.2d at 450; see *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 866 (8th Cir. 2013);

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[2] Petitioner observes (Pet. 23-24) that, before the Sixth Circuit issued its decision in this case, one district court had concluded that Section 1369(b)(1) does not authorize review of the Clean Water Rule. See *North Dakota* v. *United States EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015). After the court below issued its decision, however, that district court stated that, "[b]ased on the ruling by the Sixth Circuit, it is unclear whether this court continues to retain jurisdiction," and it stayed the proceedings pending any further decision by the courts of appeals or this Court. *North Dakota* v. *U.S. EPA*, 15-cv-59 Docket entry No. 156, at 3 (May 24, 2016).

Friends of the Everglades v. *United States EPA*, 699 F.3d 1280, 1287 (11th Cir. 2012), cert. denied, 134 S. Ct. 421, and 134 S. Ct. 422 (2013); *Northwest Envtl. Advocates* v. *United States EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008); *NRDC*, 673 F.2d at 405 (D.C. Cir.). The Sixth Circuit's decision in this case, which found the Clean Water Rule reviewable because it "produce[s] various limitations on point-source operators and permit issuing authorities," Pet. App. 17a, fits comfortably within that body of precedent. See *id.* at 11a (observing that the Sixth Circuit's interpretation of Section 1369 "finds support in several decisions of our sister circuits"); *id.* at 44a n.2 (Griffin, J., concurring in the judgment) (recognizing that the Sixth Circuit's interpretation does not "diverge[] from the predominant view of the other circuits").

b. Petitioner asserts (Pet. 21-23) that the court of appeals' decision conflicts with the Eleventh Circuit's decision in *Friends of the Everglades*, *supra*, and the Ninth Circuit's decision in *Northwest Environmental Advocates*, *supra*. Petitioner's reliance on those decisions is misplaced.

In *Friends of the Everglades*, the Eleventh Circuit held that it lacked jurisdiction under Section 1369(b)(1) to consider an EPA rule providing that no CWA permit was required for certain transfers of water from one body of water to another. 699 F.3d at 1284. That rule was premised on EPA's conclusion that the transfers at issue fall outside the CWA's definition of "discharge" because they do not involve the "addition of any pollutant to navigable waters," 33 U.S.C. 1362(12)(A). See 73 Fed. Reg. 33,699 (June 13, 2008). The Eleventh Circuit held that the challenged rule did not qualify as a "limitation" within the meaning of

Section 1369(b)(1)(E) because it "imposes no restrictions on entities engaged in water transfers," but instead "does the exact opposite" by "free[ing] the industry from the constraints of the permit process." *Friends of the Everglades*, 699 F.3d at 1286-1287. The court distinguished prior decisions of the D.C. and Fourth Circuits, which had exercised jurisdiction under Section 1369(b)(1)(E) to review EPA regulations that governed the NPDES permitting process, on the ground that the regulations at issue in those cases had restricted industry discretion. See *id.* at 1287. The court further held that Section 1369(b)(1)(F) did not confer jurisdiction because "a permanent exemption from the permit program frees the discharging entities from further monitoring, compliance, or renewal procedures," which the court considered to be "meaningfully different from the action that the Supreme Court held in *Crown Simpson* to be functionally similar to the denial of a permit." *Id.* at 1288.

As petitioner observes (Pet. 21), the Eleventh Circuit's ruling in *Friends of the Everglades* conflicts with the Sixth Circuit's decision in *National Cotton Council of America* v. *United States EPA*, 553 F.3d 927 (2009) (*National Cotton*), cert. denied, 559 U.S. 936, and 130 S. Ct. 1505 (2010), which held that Section 1369(b)(1) conferred jurisdiction on the court of appeals to review an EPA regulation that exempted certain pesticide applications from the CWA's permitting requirements, *id.* at 929, 933. That disagreement may warrant review in an appropriate case,[3] but it is

[3] The government sought this Court's review of the Eleventh Circuit's decision in *Friends of the Everglades*, but the Court denied the petition. *EPA* v. *Friends of the Everglades*, 134 S. Ct. 421 (2013) (No. 13-10).

not implicated here. Unlike the regulation at issue in *Friends of the Everglades*, the Clean Water Rule restricts pollutant dischargers and permit issuers by clarifying that discharges of pollutants into waters covered by the Rule require a permit and are prohibited without one. Because the Eleventh Circuit drew a sharp jurisdictional line between regulations that restrict industry discretion and those that "free[] the industry from the constraints of the permit process and allow[] the discharge of pollutants," *Friends of the Everglades*, 699 F.3d at 1287, the Sixth Circuit's decision in this case is "readily reconcilable" with *Friends of the Everglades*. See Pet. App. 14a.[4]

Contrary to petitioner's contention (Pet. 22-23), the decision below does not conflict with the Ninth Circuit's decision in *Northwest Environmental Advocates*. There, the Ninth Circuit held that Section 1369(b)(1) did not authorize review of an EPA regulation that

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[4] Petitioner contends (Pet. 22) that the regulation at issue in *Friends of the Everglades* created limitations in addition to exemptions, but the Eleventh Circuit did not view the rule that way, instead finding that it "impose[d] no restrictions on entities engaged in water transfers." 699 F.3d at 1286. In contrast, the Clean Water Rule "impose[s] * * * additional restrictions on the activities of some property owners." Pet. App. 15a. Petitioner's speculation (Pet. 22) that the Eleventh Circuit would decline to exercise jurisdiction to review a regulation having that effect is unfounded in light of that court's emphasis on the distinction between limitations and exemptions. See *Georgia* v. *McCarthy*, No. CV215-79, 2015 WL 5092568, at *2 (S.D. Ga. Aug. 27, 2015) (recognizing that *Friends of the Everglades* "looked to the impact of the rule to see if it restricted pollutants," and concluding that the Clean Water Rule is subject to direct court of appeals review under that analysis because "its undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the [CWA's] permit program").

exempted certain vessel discharges from the Act's permit requirements. 537 F.3d at 1010, 1015-1018. The court held that Section 1369(b)(1)(E) did not encompass the regulation because EPA's action in exempting certain discharges from the CWA "provides no limitation whatsoever." *Id.* at 1016. The court further held that Section 1369(b)(1)(F) did not apply because the regulatory exemption was not tethered to specific CWA provisions involving the NPDES permitting process and so could not be characterized as "involv[ing] the issuance or the denial of a permit or a functionally similar action." *Id.* at 1018.

The Sixth Circuit's decision in this case does not conflict with *Northwest Environmental Advocates* because the Clean Water Rule's definition of "waters of the United States" reflects EPA's interpretation of specific language in the CWA and effects a limitation on entities who would discharge into waters covered by that definition. Indeed, the court in *Northwest Environmental Advocates* specifically recognized that Section 1369(b)(1) confers jurisdiction to consider a regulation with those features. The Ninth Circuit acknowledged that EPA regulations that interpret express exemptions contained in the CWA are reviewable under Section 1369(b)(1). 537 F.3d at 1017 (distinguishing *Natural Resources Defense Council, Inc.* v. *United States EPA*, 966 F.2d 1292 (9th Cir. 1992), and *Natural Resources Defense Council* v. *United States EPA*, 526 F.3d 591 (9th Cir. 2008)). The court also distinguished a prior Ninth Circuit decision that had "exercised jurisdiction under [Section 1369(b)(1)(F)] over a challenge to an EPA regulation of stormwater discharges from inactive mining operations" on the ground that the earlier case had involved a challenge

to "the requirement that certain mines obtain a permit, not an exemption." *Id.* at 1016-1017 (distinguishing *American Mining Congress* v. *United States EPA*, 965 F.2d 759, 763 (9th Cir. 1992)). The Sixth Circuit's decision therefore is not "at odds" (Pet. 22) with *Northwest Environmental Advocates*.

3. The interlocutory posture of this case also counsels against further review at this time. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (observing that the interlocutory nature of a case "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari); see also, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari).

The Sixth Circuit "is significantly far[] along the decisional path" in resolving the challenges to the Clean Water Rule on the merits. *Georgia* v. *McCarthy*, 833 F.3d 1317, 1321 (11th Cir. 2016) (staying district court suit challenging the Clean Water Rule). Merits briefing will be completed in March 2017, and the Sixth Circuit has stated that oral argument will be scheduled "as soon as practicable" thereafter. C.A. Doc. 125, at 2 (Oct. 25, 2016). Because the Sixth Circuit has issued a nationwide stay of the Rule, the Rule will not place any burden on regulated entities while the litigation on the merits continues. If petitioner is satisfied with the Sixth Circuit's merits determination, this Court's review of the question presented may be unnecessary. If petitioner is dissatisfied with the Sixth Circuit's merits determination, it may raise the jurisdictional question, together with any other challenges arising from the Sixth Circuit's merits determination, in a single petition for a writ of certiorari following a

final judgment. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
J. DAVID GUNTER II
ROBERT J. LUNDMAN
Attorneys

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No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD CLAMAGE
JED GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

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REPLY BRIEF FOR THE PETITIONER

The agencies concede (at 6-8) that the Sixth Circuit held that it does *not* have original jurisdiction over challenges to the WOTUS Rule under Section 1369(b)(1)(E) because that Rule does not "approv[e] or promulgat[e] any effluent" or "other limitation." Yet they devote much of their brief in opposition to arguing that the Sixth Circuit's holding on this point *was incorrect*. See U.S. Br. 11-14, 16-17.

The agencies concede (at 8) that the *sole* reason that the Sixth Circuit found jurisdiction under Section 1369(b)(1)(F), which grants courts of appeals original jurisdiction in challenges to agency action "issuing or denying any permit under section 1342," is because Judge Griffin—though he concluded that Subsection (F) "on its face" "simply does not apply here"—believed he was bound by prior circuit precedent in *National Cotton* to hold otherwise. Pet. App. 33a, 38a-40a.

The agencies concede that "the Eleventh Circuit's ruling in *Friends of the Everglades* conflicts with the Sixth Circuit's decision in *National Cotton*," which was the outcome-determinative precedent below. U.S. Br. 21. And though they now try to distance this case from *Friends* by arguing that the latter involved a rule defining exclusions from CWA permitting requirements, in *Friends* itself the agencies told this Court that "the Rule [at issue there] also imposes limits on point sources." U.S. Reply Br. 11, No. 13-10.

No wonder that, as the agencies also concede (at 19 n.2), district courts have stayed their rulings pending action by this Court. The jurisdictional question is a swamp that routinely mires challenges to CWA rules in inefficient, multi-court litigation over where the

challenge belongs. Pet. 26-28; AFBF Resps. Br. 7-9. This uncertainty wastes party, agency, and judicial time and resources on an issue that the fractured 1-1-1 decision below does nothing to resolve. "'[J]urisdictional rules should be clear'" (*Direct Marketing Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1133 (2015)); only this Court's intervention can clarify Section 1369(b)(1). See State Resps. Br. 22-26.

The agencies do not dispute the importance of the question presented. Nor could they, having told this Court when urging review in *Friends of the Everglades* that jurisdiction over CWA rule challenges is "an issue of recurring and exceptional importance." U.S. Reply Br. 1, No. 13-10; see also *id.*, U.S. Pet. for Cert. 9 (this Court has previously granted certiorari "'because of the importance of determining the locus of judicial review of the actions of EPA,'" which has "significant consequences"). The importance of resolving the question presented is confirmed by the briefs submitted by respondents supporting the NAM's petition. Those briefs were filed on behalf of no fewer than 31 States, as well as by industry groups and corporations representing a diverse array of American businesses including agriculture, forestry, minerals extraction and processing, energy, and home and infrastructure building.

The question presented satisfies every criterion for Supreme Court review and cries out for immediate resolution. None of the agencies' arguments to the contrary pass muster.

1. The agencies are wrong in arguing (at 10-19) that Section 1369(b)(1) grants the Sixth Circuit jurisdiction.

a. The agencies offer no textual defense of the panel's erroneous exercise of jurisdiction under Section

1369(b)(1)(F), which applies to EPA actions "issuing or denying any permit under section 1342." There is none. Each panel member understood that Subsection (F) by its plain meaning does not apply. See Pet. App. 17a (McKeague, J.) (no jurisdiction under "a strictly literal application"); *id.* 39a (Griffin, J.) ("On its face, subsection (F) clearly does not apply"); *id.* 45a (Keith, J.) (no jurisdiction "under the plain meaning"). That "should end the analysis." *Id.* 39a (Griffin, J.).

The agencies instead seek a "pragmatic construction" of Section 1369(b)(1)(F) under *Crown Simpson Pulp*. U.S. Br. 11. But they mistakenly claim that decision "authorize[s] original jurisdiction in the courts of appeals of EPA actions that *directly affect* CWA permitting decisions." *Ibid.* (emphasis added). *Crown Simpson* did no such thing. It narrowly held that EPA's vetoes of state-proposed Section 1342 permits for a single facility fell within Section 1369(b)(1)(F) because they had "the precise effect" of a denial of permits in states where EPA issues permits. 445 U.S. at 196. Unlike permit vetoes, the WOTUS Rule does not functionally deny permits. The majority below and many other courts have rejected the agencies' misreading of *Crown Simpson*. See Pet. App. 40a (Griffin, J.) (*Crown Simpson* "simply does not apply"); *id.* 45a (Keith, J.) (same); *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008) (*Crown Simpson* "understood functional similarity in a narrow sense"); *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1287-1288 (11th Cir. 2012).

b. The agencies incorrectly argue, contrary to the decision below, that jurisdiction lies under Section 1369(b)(1)(E), which covers EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." But the agencies' assertion (at 13) that the WOTUS Rule is an

"other limitation under section 1311" is "not compelling," as even Judge McKeague concluded. Pet. App. 9a.

The Rule is no "limitation" at all. The agencies concede that it is "not self-executing" but merely "helps to delineate the practical scope" of the Act. U.S. Br. 14, 16. As Judge Griffin explained, it is "circular" to claim that a regulation defining the Act's "jurisdictional reach" is a "'limitation[]' under" the Act. Pet. App. 32a. And while the agencies now assert (at 16) that the Rule "triggers the Act's prohibitions and permitting requirements," they said the opposite when they issued the Rule: it "does not establish any regulatory requirements" and "imposes no enforceable duty" on "the private sector." 80 Fed. Reg. at 37,054, 37,102.

Because it is not similar to an "effluent limitation," the Rule also is not an "other limitation." The agencies argue (at 16-17) that *ejusdem generis* does not apply because "'two or more things'" did not precede the term "other limitation." But *ejusdem generis* applies even when one specific term precedes a general term. *E.g.*, *Nowak* v. *United States*, 356 U.S. 660, 664 (1958). Moreover, "[a] general tag-on renders a single specific word superfluous no less than a series of words." Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 206 (2012). Accordingly—and even if *noscitur a sociis* is the better canon—"effluent limitation" still constrains "other limitation." See States Resps. Br. 14. Congress would not have said "any effluent limitation or other limitation" if it meant "any limitation." Its inclusion of the words "effluent limitation" must be given meaning. See *Am. Paper Inst.* v. *EPA*, 890 F.2d 869, 877 (7th Cir. 1989) (interpreting "other limitation" as "restricted to limitations directly related to effluent limitations").

The agencies' claim (at 13) that the WOTUS Rule was issued "under Section 1311" is wrong. See Pet. App. 31a (Judge Griffin explained that the Rule "does not emanate" from Section 1311). The Rule defines a phrase that appears exclusively in Section 1362. To be sure, it *impacts* Section 1311, as it does many other CWA sections; but that does not make it issued "under" Section 1311, which governs technology-based effluent limitations.

This Court's decision in *E.I. du Pont de Nemours* confirms the point. There, this Court held that industry-wide effluent limitations that were *actually* issued under Section 1311 "unambiguously" fell within Subsection (E). 430 U.S. at 136. In so ruling, the Court avoided the "perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits * * * but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.* But as Judge Griffin explained, this Court's "policy reason came *after* a plain textual" analysis of Subsection (E). Pet. App. 35a. The agencies would turn *du Pont* on its head by allowing the agencies' preferred policy to *supplant* plain statutory language. *Ibid.*

c. The agencies have no answer to our argument that Congress would not have enumerated seven narrow categories of agency action as directly reviewable in the courts of appeals if it broadly intended direct review of every regulation affecting permitting. See Pet. 19-20 (citing cases). Nor do they acknowledge that the Clean Air Act expressly authorizes the court of appeals to review *any* "nationally applicable regulations" (42 U.S.C. § 7607(b)(1))—language conspicuously absent from the CWA. Both points confirm the agencies' misreading.

d. The agencies' "limitless" interpretation of Section 1369(b)(1) is evident in their failed attempts to cabin the statute. They cite *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012), and *American Farm Bureau Federation* v. *EPA*, 792 F.3d 281 (3d Cir. 2015), as challenges properly brought in district courts. U.S. Br. 18. But under their reading, both challenges should have been filed in the courts of appeals.

The *Sackett* plaintiffs challenged EPA's determination that property contained "jurisdictional wetlands" and that they had violated Section "1311" by adding fill material without a "permit." 132 S. Ct. at 1370-1371. EPA had "identif[ied] the locations where the CWA's prohibitions apply and where permits are required"—the agencies' test for jurisdiction under Section 1369(b)(1). U.S. Br. 11. Under that analysis, this Court lacked subject-matter jurisdiction in *Sackett*.

Farm Bureau challenged an EPA regulation that imposed "pollution limits to specific point sources" that are "regulated" under Section "1342." 792 F.3d at 302. The regulation thus "impose[d] limitations essential to the proper operation of the [Section 1342] permitting system or directly govern[ed] the issuance of those permits." U.S. Br. 18. Under the agencies' reading, the regulation therefore should have been "reviewable under Section 1369(b)(1)." *Ibid.*

As these examples demonstrate, there is no end to the agencies' atextual logic. "[J]urisdictional rules should be clear." *Lapides*, 535 U.S. at 621. But the agencies' interpretation would inject jurisdictional uncertainty into every CWA suit.

e. The agencies' response (at 18) to our argument that the panel's ruling deprives the parties, agencies, and courts of the benefits of multilateral review of agency rulemaking is simply that "Congress made a

different judgment in enacting Section 1369(b)(1)." But that begs the question whether Congress intended the WOTUS Rule to fall within Section 1369(b)(1). And the agencies' citation (at 19) to a statement in the House report that Section 1369(b) "'establish[es] a clear and orderly process for judicial review'" ignores the fact that the very next paragraph clarifies that "inclusion of section [1369] is not intended to exclude judicial review" that is "otherwise permitted by law," including under the APA. H.R. Rep. No. 92-911, at 136 (1972).

Regardless, "policy arguments cannot supersede the clear statutory text." *Universal Health Servs., Inc.* v. *United States*, 136 S. Ct. 1989, 2002 (2016). Because the WOTUS Rule falls outside Section 1369(b)(1)'s plain language, the Sixth Circuit erred in exercising jurisdiction.

2. The agencies acknowledge (at 21) that a circuit conflict exists: "the Eleventh Circuit's ruling in *Friends of the Everglades* conflicts with the Sixth Circuit's decision in *National Cotton*." Their claim (at 22) that this conflict is "not implicated here" is incorrect. Judge Griffin—the deciding vote below—would have found "jurisdiction lacking" "[b]ut for *National Cotton*." Pet. App. 39a. The conflict was outcome determinative.

The agencies (at 20-22) argue that *Friends* concerned an "'exemption from the permit program'" and that "[u]nlike the regulation" in *Friends*, the WOTUS Rule "restricts pollutant dischargers." Each part of that analysis is incorrect. First, as the government represented to this Court in *Friends*, the regulation there "impose[d] limits on point sources." U.S. Cert. Reply Br. 11, No. 13-10. Second, as the agencies acknowledge (at 4), the WOTUS Rule "maintains" and "adds additional categorical exclusions" under the CWA. Indeed, petitioners in the Sixth

Circuit are challenging those exclusions. See Br. of Nat'l Wildlife Fed'n 5 (6th Cir.). Even if there were a "distinction between limitations and exemptions" (U.S. Br. 22 n.4), the panel's decision to review the WOTUS Rule *still* conflicts with *Friends*.

The agencies fail to distinguish the Ninth Circuit's ruling in *Northwest Environmental Advocates* for the same reason. Indeed, Judge Griffin cited *Northwest Environmental Advocates* in highlighting the "problems with extending jurisdiction to cover the [WOTUS] Rule" since the Rule "identifie[s] situations" where "there would never be permit decisions." Pet. App. 41a-42a. The Ninth Circuit firmly rejected the "'expansive application'" of Section 1369(b)(1) that the agencies advocate here. 537 F.3d at 1015.[1]

In brushing aside *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015), which held that courts of appeals *lack* jurisdiction to review the WOTUS Rule, the agencies (at 19 n.2) fail to note that the district court there *denied* their renewed motion to dismiss *after* the Sixth Circuit panel voted to exercise jurisdiction. The district court stayed the case "pending any further decision" by the "Supreme Court," confirming that this conflict remains live. Order, Dkt. No. 156, No. 3:15-cv-59 (D.N.D. May 24, 2016).

3. The agencies do not deny the immense importance of the question presented. Nor could they. They admit that the government petitioned this Court to interpret Section 1369(b)(1) in *Friends of the*

---

[1] The agencies misrepresent (at 20) that Judge Griffin concluded the Sixth Circuit's decision did "not 'diverge[] from the predominant view of the other circuits.'" In fact, Judge Griffin found *National Cotton* in conflict with *Friends of the Everglades* and *Northwest Environmental Advocates* and believed that *Friends'* criticisms of *National Cotton* "have merit." Pet. App. 43a.

Everglades. U.S. Br. 21 n.3. And they recognize (at 3) that the WOTUS Rule would "pla[y] a central role in defining the reach" of the CWA. The briefs of 31 States and numerous industry groups and corporations as respondents in support of the petition confirm the importance of the jurisdictional issue.

The agencies argue (at 19) that the petition "embraces" "extended uncertainty," but overlook that extended uncertainty is the current norm in CWA litigation. Challengers to agency actions under the CWA routinely file duplicative suits in the district courts and courts of appeals because they cannot predict which court will decide that it has exclusive jurisdiction. See Pet. 25. The agencies do not deny that jurisdictional uncertainty *still* pervades the litigation challenging the regulation at issue in *Friends of the Everglades*, which was promulgated by EPA in 2008. See Pet. 26-27. And the agencies do not deny that the same jurisdictional dispute will continue be litigated in case after case until this Court intervenes and provides desperately needed guidance.

4. The agencies appeal (at 24) to the general rule disfavoring interlocutory review, but fail to acknowledge that questions of subject matter jurisdiction are a well-established exception. See Pet. 32. That is for good reason. Review of a jurisdictional holding that, if not corrected, will result in enormous wasted effort and expenditure is an issue "fundamental to the further conduct of the case." *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947). And full-blown review of a major CWA rule by a court of appeals that lacks jurisdiction—and where a majority of the panel concluded that it lacks jurisdiction under a *correct* interpretation of the statute—makes this a "cas[e] of peculiar gravity and general importance" warranting interlocutory review. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251,

258 (1916). See Shapiro *et al.*, SUPREME COURT PRACTICE 283 (10th ed. 2013) (where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing numerous examples).

The agencies are less than candid with this Court when they assert (at 9, 24) that it should not intervene now because the case is far along in the Sixth Circuit. A certiorari grant by this Court would predictably result in a stay of proceedings in the Sixth Circuit, before the agencies file their 63,000-word brief due January 18, the intervenors file multiple briefs due February 8, the four sets of petitioners file their reply briefs due March 8, the parties prepare the massive deferred appendix, the parties submit final-form briefs, the Sixth Circuit hears argument and renders a decision based on thousands of pages of briefs and tens of thousands of pages of record, and the full court considers the inevitable *en banc* petitions. The parties, the judiciary, and taxpayers should not be required to endure that enormous expenditure of money and effort in a case that is proceeding in the wrong court.

A lack of candor is evident too in the agencies' failure to mention the imminence of a new Administration. A grant of certiorari now would foreclose the need for the otherwise inevitable motion practice over how the case should proceed in light of President-Elect Trump's promise that his Administration "will eliminate the highly invasive 'Waters of the US' rule." President-Elect Donald J. Trump Transition, *Energy Independence*, https://greatagain.gov/energy-independence-69767de8166#.5orwmlrxk. See, *e.g.*, *Mississippi* v. *U.S. EPA*, No. 08-1200 (D.C. Cir. 2009) (motion practice resulting in abeyance of

litigation over Ozone NAAQS while Obama EPA reconsidered the Bush-era rule). Whether merits briefing eventually proceeds as to the propriety of the current WOTUS Rule or instead as a challenge to an EPA revocation of that Rule, the jurisdictional issue under Section 1369(b)(1) remains live, recurring, uncertain, the subject of a circuit conflict, and critically in need of this Court's resolution.[2]

CONCLUSION

The petition for certiorari should be granted.

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[2] The possibility that the Sixth Circuit merits litigation may be held in abeyance at some point after the change in Administration makes this case more rather than less suitable for review. The agencies' review of the WOTUS Rule will take many months even after new agency personnel are in place and will conclude long after this Court has decided where jurisdiction belongs. *E.g.*, *Mississippi*, *supra* (EPA requested abeyance in March 2009 and announced its intent to reconsider the Ozone NAAQS rule in September 2009). When litigation resumes, over either the Rule or its revocation, it can restart in the correct court in accordance with this Court's ruling on Section 1369(b)(1) jurisdiction.

Respectfully submitted.

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center
for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD CLAMAGE
JED GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

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No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD M. CLAMAGE
JED GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under 33 U.S.C. § 1369(b)(1) over a petition for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act.*

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* This is the Question Presented by the Solicitor General in his brief in opposition. The Question Presented in the petition for certiorari asked whether the Sixth Circuit erred in holding that it had jurisdiction under 33 U.S.C. § 1369(b)(1)(F). In the brief in opposition, the Solicitor General also defended the judgment on the alternative ground—presented below but rejected by the court of appeals—that the court of appeals had original jurisdiction under 33 U.S.C. § 1369(b)(1)(E). Petitioner therefore has rephrased the question pursuant to this Court's Rule 24.1(a) to more accurately reflect the procedural posture of the case. Jurisdiction under both Subsections was briefed and decided below, briefed by the parties at the certiorari stage, and petitioner addresses both in this brief.

PARTIES TO THE PROCEEDINGS BELOW

After the Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the Sixth Circuit (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)), the Sixth Circuit permitted petitioner here, the National Association of Manufacturers, to intervene as a respondent. Order, No. 15-3751 cons. (Sept. 16, 2015).

Respondents below—the federal agency respondents here—are the U.S. Environmental Protection Agency; E. Scott Pruitt, in his official capacity as EPA Administrator; the U.S. Army Corps of Engineers; Lieutenant General Todd T. Semonite, in his official capacity as the Corps' Chief of Engineers and Commanding General; the Acting Assistant Secretary of the Army (Civil Works) in his or her official capacity; and Robert M. Speer, in his official capacity as Acting Secretary of the Army.

State intervenor-respondents below and respondents here are the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

Over 100 other parties filed 22 petitions for review below, and intervened in other petitions, and many of those petitioners moved to dismiss their own and other petitions for review for want of jurisdiction. Those petitioners below, respondents here, are as follows:

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, New Mexico State Engineer.

No. 15-3837: Waterkeeper Alliance; Center for Biological Diversity; Center for Food Safety; Humboldt Baykeeper; Russian Riverkeeper; Monterey Coastkeeper; Upper Missouri Waterkeeper, Inc.; Snake River Waterkeeper, Inc.; Turtle Island Restoration Network, Inc.

No. 15-3839: Puget SoundKeeper; Sierra Club.

No. 15-3850: American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc., and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of

Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

Many of these petitioners in the court of appeals also filed complaints in district courts. Those actions are *North Dakota* v. *EPA*, No. 3:15-cv-59 (D.N.D.); *Murray Energy Corp.* v. *EPA*, No. 1:15-cv-110 (N.D. W. Va.); *Ohio* v. *EPA*, 2:15-cv-2467 (S.D. Ohio); *Am. Farm Bureau Fed'n* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.); *Texas* v. *EPA*, No. 3:15-cv-162 (S.D. Tex.); *Ass'n of Am. Railroads* v. *EPA*, No. 3:15-cv-266 (S.D. Tex.); *Georgia* v. *McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *Oklahoma ex rel. Pruitt* v. *EPA*, No. 4:15-cv-381 (N.D. Okla.); *Chamber of Commerce* v. *EPA*, No. 4:15-cv-386 (N.D. Okla.); *Southeastern Legal Foundation* v. *EPA*, No. 1:15-cv-2488-TCB (N.D. Ga.); *Washington Cattlemen's Association* v. *EPA*, No. 0:15-cv-3058 (D. Minn.); *Puget Soundkeeper Alliance* v. *McCarthy*, No. 2:15-cv-1342 (W.D. Wash.); *Waterkeeper Alliance* v. *EPA*, No. 3:15-cv-3927 (N.D. Cal.); *Natural Resources Defense Council* v. *EPA*, No. 1:15-cv-1324 (D.D.C.); *Am. Exploration & Mining Ass'n* v. *EPA*, No. 1:15-cv-1323 (D.D.C.); and *Arizona Mining Ass'n* v. *EPA*, No. 2:15-cv-1752 (D. Az.).

CORPORATE DISCLOSURE STATEMENT

Petitioner National Association of Manufacturers is a not-for-profit public advocacy group. It has no parent corporation and does not issue stock.

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BRIEF FOR PETITIONER[1]

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-47a) is reported at 817 F.3d 261. The court of appeals' denial of rehearing en banc, which is unreported, is reproduced at Pet. App. 51a-52a.

JURISDICTION

The judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of jurisdiction was entered on February 22, 2016. Pet. App. 48a-50a. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. *Id.* at

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[1] Petitioner the National Association of Manufacturers ("the NAM") filed suit challenging the waters of the United States Rule in district court as part of a broad-based coalition of 18 industry groups. *Am. Farm Bureau Fed'n, et al.* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.). When that coalition also filed a protective petition for review in the Sixth Circuit, it agreed that the NAM would *not* join the petition, so as to ensure that the NAM could challenge the Sixth Circuit's jurisdiction.

The NAM's fellow coalition members, petitioners in No. 15-3850, filed a brief as respondents in support of the NAM's certiorari petition. These respondents—the American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association—each fully supports and joins in the arguments made in this brief and will not be filing a separate brief.

51a. On July 1, 2016, Justice Kagan extended the time to file a petition for certiorari to September 2, 2016. This Court granted a timely filed petition for certiorari on January 13, 2017. Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

Relevant portions of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, are reproduced in an Addendum. The Waters of the United States Rule ("WOTUS Rule" or "Rule") is published at *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015).

STATEMENT

A. Introduction

Section 509(b) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1369(b), provides for "judicial review in the United States courts of appeals of various particular actions by the [EPA] Administrator." *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13-14 (1981). The seven categories of action specified in Section 1369(b)(1) are EPA Administrator action

> (A) in promulgating any standard of performance under section 1316 of this title [for new sources of discharges],
>
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title [for toxic pollutants or pollutants introduced into treatment works],

> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title, and
>
> (G) in promulgating any individual control strategy under section 1314(*l*) of this title [to address toxic pollutant discharges] * * *.

Jurisdiction in the courts of appeals over challenges to those EPA actions is not only original, but also "exclusive." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). And "an application for review must be lodged in the court of appeals within 120 days of the Administrator's action, §1369(b)(1)." *Ibid.*

Challenges to final agency action under the CWA not covered by Section 1369(b)—including all actions by the U.S. Army Corps of Engineers ("Corps") in administering permits for discharges of dredged and fill material under Section 1344—are governed by the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"). The APA provides that "[a] person suffering legal wrong" or "adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. An APA suit may be brought within six years of the challenged agency action. 28 U.S.C. § 2401(a).

Section 1369(b) thus "extends only to *certain* suits challenging *some* agency actions" taken by *one* of the federal agencies that, along with the States, are

responsible for implementing the CWA. *Decker*, 133 S. Ct. at 1334 (emphasis added). Litigants whose claims fall outside those narrow confines may invoke the jurisdiction of the district court under the APA and 28 U.S.C. § 1331.[2]

In this case, challengers filed numerous petitions for review of the final WOTUS Rule promulgated jointly by EPA and the Corps. 80 Fed. Reg. 37,054 (June 29, 2015). That Rule significantly revised the scope of the Clean Water Act by redefining the phrase "the waters of the United States." Rejecting intervenor the NAM's and other motions to dismiss the petitions for lack of jurisdiction, the Sixth Circuit held that it had original jurisdiction over the rule challenges by virtue of Section 1369(b)(1)(F). Following circuit precedent that the judge who supplied the controlling vote deemed "incorrect" (Pet. App. 44a), the majority held that the petitions for review fell under Subsection (F) because they challenged an EPA "regulation 'governing'" permitting pursuant to the National Pollutant Discharge Elimination System ("NPDES") established in 33 U.S.C. § 1342. Pet. App. 44a.

The agencies, in their brief in opposition to certiorari, defended the Sixth Circuit's judgment on the additional ground—rejected by the majority below—that the WOTUS Rule falls under Section 1369(b)(1)(E) because it "approv[es] or promulgat[es] any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." See Br. for Fed. Resps. in Opp. 11, 13-14 ("Fed. BIO"). Accordingly, the applicability of both

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[2] Section 1365 governs citizen enforcement actions, including claims that the Administrator failed to perform a non-discretionary duty. Congress provided that "[t]he district courts shall have jurisdiction" over such claims. 33 U.S.C. § 1365(a).

Subsections (E) and (F) to the petitions for review is before this Court.

A majority of the Sixth Circuit panel correctly recognized that it is "illogical and unreasonable" to conclude that either Subsection (E) or (F) governs challenges to the WOTUS Rule. Pet. App. 29a (Griffin, J., concurring in judgment); see *id.* at 45a (Keith, J., dissenting). The Rule does not fit within the plain and unambiguous language of either subsection. The Rule defines a basic jurisdictional term used throughout the CWA; it does not approve or promulgate an effluent or other limitation under any of the specified provisions of the Act, or issue or deny any permit under the NPDES program. A plain reading of statutory text is enough to require reversal. And it is the only approach that produces a "[s]imple jurisdictional rule" that promotes "predictability" and under which courts "can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010).

Other considerations confirm that conclusion. Canons of statutory interpretation, statutory structure, legislative history, the principle that "jurisdictional rules should be clear" (*Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002)), and the presumption that agency action is reviewable all contradict the agencies' position and support reversal. And contrary to the agencies' contention, this Court's decisions in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), are readily distinguishable and in any event cast no doubt on that analysis.

This Court should reverse the judgment of the court of appeals and order dismissal of the petitions for review for want of jurisdiction.

B. The Clean Water Act

Congress enacted the Clean Water Act to eliminate "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a)(1). Section 1311(a) of the Act generally prohibits "the discharge of any pollutant by any person" without a permit. A "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source," such as a pipe, ditch or other "confined and discrete conveyance." *Id.* § 1362(12), (14). "Navigable waters," in turn, are defined as "the waters of the United States." *Id.* § 1362(7).

Accordingly, whether a feature qualifies as a "water of the United States" is only one factor, along with other complex inquiries—such as whether an activity involves an "addition" of a "pollutant" from a "point source"—that determines whether a CWA permit is required for an activity. That determination depends too on whether exclusions to permitting requirements apply, such as those for certain water transfers,[3] stormwater discharges from most logging operations,[4] agricultural return flows,[5] certain discharges from mining, oil, or gas operations,[6] and others. By itself, determining that a feature is a "water of the United States" tells one nothing about how land may be used or whether an activity requires or qualifies for a permit; instead it leads to a further inquiry focused on other statutory and regulatory

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[3] See 40 C.F.R. § 122.3(i); *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe*, 541 U.S. 95 (2004)

[4] See 40 C.F.R. § 122.26(a)(1)(ii), (b)(14)(ii); *Decker*, 133 S. Ct. 1326.

[5] See 33 U.S.C. § 1342(*l*)(1).

[6] See 33 U.S.C. § 1342(*l*)(2), § 1362(6)(b), (24).

factors that, together, determine what and how substantive rules apply.

The CWA permitting programs. The Act establishes two permitting programs to regulate discharges of pollutants into the waters of the United States. The NPDES program established in 33 U.S.C. § 1342 authorizes EPA to issue permits for discharges that do not involve fill material—generally, effluent discharges. An NPDES permit imposes effluent limits based on the technology available to treat the pollutants. It restricts "the quantities, rates, and concentrations of specified [pollutants] which are discharged from point sources." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992); see 33 U.S.C. §§ 1311(b)(1)(A)-(B), 1317(a), 1342(a)(3), (b)(1)(A).

Sometimes technology-based limits are insufficient to achieve water quality standards "promulgated by the States [to] establish the desired condition of a waterway." *Arkansas*, 503 U.S. at 101. In that event, permits also impose any more stringent limits or strategies necessary to achieve water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1312(a). Most States administer the Section 1342 permit program within their own borders, as authorized under Section 1342(b).

Section 1344 establishes a separate permit program, administered by the Corps of Engineers, for "the discharge of dredged or fill material into the navigable waters." That program applies to discharges of "solids that do not readily wash downstream" (*Rapanos* v. *United States*, 547 U.S. 715, 723 (2006) (plurality)) and so "chang[e] the bottom elevation" of water. 40 C.F.R. § 232.2. In determining whether to issue a Section 1344 permit, the Corps applies criteria developed by both EPA and the Corps pursuant to

Section 1344(b)(1). EPA also has the authority to veto the specification of a site for discharge of fill material. 33 U.S.C. § 1344(c); see *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 266-269 (2009). Two States operate the Section 1344 program under Section 1344(g).

The CWA's jurisdictional terms define the geographic scope of the entire statute. The terms "navigable waters" and "waters of the United States" define the geographic reach of the Act's two permitting schemes, but also that of "the entire statute." *Rapanos*, 547 U.S. at 742. Those terms appear repeatedly throughout the 1972 Act and its later amendments to establish the geographic scope of regulatory programs and actions. For example:

- Section 1313(c)(2)(A) requires each State to establish water quality standards based on "the designated uses of the navigable waters" within its borders, subject to EPA oversight and EPA's authority to promulgate water quality standards if the State does not adequately do so. See 33 U.S.C. § 1313(c)(3).
- Section 1314(*l*) requires each State to identify "all navigable waters in such State" that cannot meet State water quality standards due to point-source discharges of toxic pollutants, and to develop "an individual control strategy" to address those discharges, which EPA must approve or reject and which EPA may promulgate itself if the State fails to do so. See 33 U.S.C. § 1314(*l*)(2), (3).
- Section 1329 requires each State to identify "navigable waters within the state" that cannot meet State water quality standards "without additional action to control nonpoint sources of

pollution," and to establish a program of best management practices and other measures for controlling such pollution, which EPA may approve, disapprove, modify, or implement itself if the State fails to do so. See 33 U.S.C. § 1329(d).

- Section 1252(a) requires the Administrator to "develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters * * *."
- Section 1256(e) conditions certain federal grants to the States on the adequacy of their monitoring of "the quality of navigable waters."
- Section 1288(b)(4) provides for State areawide waste treatment management plans to include best management practices to control discharges of "dredged or fill material which adversely affects navigable waters," in lieu of obtaining a Section 1344 permit.
- Section 1315(b) requires each State to provide regular, detailed reports to EPA on "the water quality of all navigable waters in such State."
- Section 1341(a)(1) conditions receipt of any federal license or permit for any activity "which may result in any discharge into the navigable waters" on obtaining "a certification from the State in which the discharge originates" that the discharge complies with specified requirements.

Accordingly, the term "waters of the United States" is one element, albeit an important one, of a reticulated statutory scheme with many components that work together. It defines the geographic reach of most of the CWA's requirements, but by itself requires no action. It imposes no obligation except when applied in conjunction with other, separate statutory concepts.

This Court has previously addressed the term "waters of the United States." This Court considered the meaning of the term "waters of the United States" in the CWA in three cases. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985), this Court concluded that the agencies permissibly interpreted "waters of the United States" to encompass wetlands that abut traditional navigable waters. In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), it struck down the agencies' "Migratory Bird Rule," which purported to extend agency jurisdiction to any waters that are or might be used as habitat for migratory birds, no matter how isolated or remote from navigable waters. And in *Rapanos*, the Court reversed the agencies' determination that they had jurisdiction over wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters," which swept in "virtually any parcel of land containing a channel or conduit * * * through which rainwater or drainage may occasionally or intermittently flow." 547 U.S. at 722, 729 (plurality); see *id.* at 759 (Kennedy, J., concurring) (applying a "significant nexus" test).

C. The Waters of the United States Rule

The WOTUS Rule purports to define "waters of the United States" within the meaning of the CWA and *Rapanos*, *SWANCC*, and *Riverside Bayview*. 80 Fed. Reg. at 37,054. The agencies describe their WOTUS Rule as "a definitional rule that clarifies the scope of the Clean Water Act." 80 Fed. Reg. at 37,104. They say that it "does not establish any regulatory requirements." *Id.* at 37,054. And they claim it "imposes no enforceable duty on any state, local, or tribal governments, or the private sector." *Id.* at 37,102; see also EPA & Corps, *Economic Analysis of the*

EPA-Army Clean Water Rule 61 (May 2015) ("The final rule is not designed to 'subject' any entities of any size to any specific regulatory burden" but "to clarify the statutory scope of 'the waters of the United States'"); *id.* at vii ("This rule does not result in any direct costs or benefits * * *. A finding of jurisdiction regarding a particular water does not incur any direct costs").

The WOTUS Rule separates waters into three jurisdictional groups. In the first group are waters that are categorically jurisdictional: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of any water deemed to be a "water of the United States," (5) certain tributaries, and (6) certain waters that are "adjacent" to the foregoing five categories of waters. 33 C.F.R. § 328.3(a).

In the second group are waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional. 80 Fed. Reg. at 37,073. Waters that are subject to jurisdiction based on a case-specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea; or (B) waters, any part of which are within 4,000 feet of the ordinary high water mark of any of those jurisdictional waters, any impoundment of those jurisdictional waters, or any covered tributary. 33 C.F.R. § 328.3(a)(8).

In the third group are waters excluded from jurisdiction. These include: swimming pools, puddles, ornamental waters, prior converted cropland, waste treatment systems, some drainage ditches, farm and stock watering ponds, settling basins, water-filled depressions incidental to mining or construction activity, subsurface drainage systems, and certain wastewater recycling structures. 33 C.F.R. § 328.3(b).

Petitioners challenging the WOTUS Rule have shown that it is deeply flawed both in substance and procedure and that the breadth and uncertainty of its definitions violate this Court's precedents and the Act. The Rule is arbitrary and capricious and not in accordance with law and consequently violates the APA, 5 U.S.C. § 706(2)(A)-(D). See Br. for the Business and Municipal Ptrs., *In re Clean Water Rule*, No. 15-3751 cons., Dkt. 129-1 (6th Cir. Nov. 1, 2016).[7] The merits of the Rule, however, are not at issue here. Merits litigation has been held in abeyance pending this Court's ruling on which court has jurisdiction.

The agencies issued a notice of proposed rulemaking announcing their "intention to review and rescind or revise" the WOTUS Rule. 82 Fed. Reg. 12497 (Mar. 3, 2017). This Court denied the agencies' motion to hold this case in abeyance pending that review. Order (Apr. 3, 2017).

D. Judicial Review Of The Rule

Scores of state, municipal, industry, and environmental plaintiffs filed suits challenging the WOTUS Rule in district courts. See *supra* p. v. The NAM filed suit, as part of a coalition of industry groups, in the Southern District of Texas. See *supra* n.1.

The Judicial Panel on Multidistrict Litigation denied the agencies' request to consolidate the district court actions and to transfer them to the District Court for the District of Columbia. See *In re Clean Water Rule*, MDL No. 2663, Dkt. 163 (JPML Oct. 13, 2015). The Judicial Panel held that transfer was inappropriate under 28 U.S.C. § 1407 because the complaints turn on issues of law and "different

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[7] Except where otherwise indicated, docket references throughout this brief ("Dkt.") are to this Sixth Circuit docket.

jurisdictional rulings by the involved courts" counseled against consolidation. *Id.* at 2.

Reflecting the uncertainty surrounding the scope of Section 1369(b) and the exclusivity of its grant of jurisdiction, many plaintiffs who filed district court actions (but not petitioner the NAM) also filed "protective" petitions for review in various courts of appeals, as courts have acknowledged is appropriate. *E.g.*, *Inv. Co. Inst.* v. *Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977) ("If any doubt as to the proper forum exists, careful counsel should file suit in both the court of appeals and the district court"); *Roll Coater, Inc.* v. *Reilly*, 932 F.2d 668, 671 (7th Cir. 1991) ("careful counsel must respond to the combination of uncertain opportunities for review and § [1369(b)(2)] by filing buckshot petitions"). Those petitions were consolidated and transferred to the Sixth Circuit pursuant to 28 U.S.C. § 2112(a). Cons. Order, MCP No. 135 (JPML July 28, 2015).[8]

The agencies moved to stay or dismiss cases in the district courts in favor of the circuit court litigation. Some district courts held that the Sixth Circuit had exclusive jurisdiction. *E.g.*, *Murray Energy Corp.* v. *EPA*, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015); *Georgia* v. *McCarthy*, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015), case stayed on appeal, 833 F.3d 1317 (11th Cir. 2016). The District Court for the District of North Dakota, by contrast, held it had jurisdiction. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015) ("If the exceptionally expansive view" of Section 1369(b) "advocated by the government is adopted, it would encompass virtually all EPA actions under the

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[8] The 22 petitions for review and more than 100 petitioners are identified *supra* pp. ii-v.

Clean Water Act"); *id.*, 3:15-cv-59, Dkt. 156 (D.N.D. May 24, 2016) (staying case "pending further decision by the Courts of Appeals or Supreme Court").

E. The Sixth Circuit's Decision

The NAM successfully moved to intervene as a respondent in the Sixth Circuit. Dkt. 8 (Sept. 16, 2015). It then moved to dismiss the petitions for want of jurisdiction (Dkt. 39 (Oct. 2, 2015)), as did many parties that had filed protective petitions or intervened.

The Sixth Circuit concluded, in a fractured 1-1-1 decision, that it and not the district courts had jurisdiction to hear the rule challenges. The panel agreed that Subsections (E) and (F) were the "only two provisions of § 1369(b)(1)" that "potentially apply" (Pet. App. 8a), but otherwise splintered.

Judge McKeague's opinion. Judge McKeague recognized that the agencies' textual arguments as to Subsection (E) were "not compelling." Pet. App. 9a. "[T]he Rule's clarified definition," he wrote, does not "approve or promulgate *any* limitation that imposes *ipso facto* any restriction or requirement on point source operators or permit issuers." *Ibid.* (emphasis added). "Rather," it is "a definitional rule that, operating in conjunction with other regulations, will result in imposition of such limitations." *Ibid.*

Judge McKeague nevertheless concluded that jurisdiction lies in the court of appeals under Subsection (E), citing this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, *supra*. He believed that *du Pont* "eschewed" a "literal reading" of Section 1369(b)(1) in favor of a "more generou[s]" interpretation that "further[ed] Congress's evident purposes." Pet. App. 10a, 13a, 26a. Judge McKeague believed this interpretation encompasses the WOTUS Rule because

the Rule's "practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." *Id.* at 17a.

Turning to Subsection (F), Judge McKeague recognized that the Rule does not "issue" or "deny" any permits, but declined to give the provision "a strict literal application." Pet. App. 17a. He pointed to this Court's opinion in *Crown Simpson Pulp Co.* v. *Costle*, *supra*, and the Sixth Circuit's decision in *National Cotton Council of America* v. *EPA*, 553 F.3d 927 (6th Cir. 2009), as supporting direct review in the circuit courts of any regulation that "*affects* permitting requirements." Pet. App. 19a (emphasis added).

Judge Griffin's concurrence. Judge Griffin concurred in the judgment only. He concluded that the Sixth Circuit lacked jurisdiction under the "plain text" of Subsection (E) because the Rule is not an "effluent limitation or other limitation," and also "does not emanate from" Sections 1311, 1312, 1316, or 1345, but "is a phrase used in the Act's definitional section, § 1362," which "is not mentioned in § 1369." Pet. App. 30a-31a. He read *du Pont* to authorize review under Subsection (E) of EPA regulations that "'promulgate effluent limitations,'" no more. *Id.* at 34a.

Judge Griffin further concluded that "[o]n its face, subsection (F) clearly does not apply" because the Rule "neither issues nor denies a permit under the NPDES." Pet. App. 39a. But he concurred in the judgment because, in his view, the Sixth Circuit's earlier (and "incorrect") decision in "*National Cotton* dictates [the] conclusion" that Subsection (F) encompasses the WOTUS Rule. *Id.* at 42a, 44a. Judge Griffin nevertheless criticized that conclusion because it means that Subsection (F)'s "jurisdictional reach" has

"no end," catching "*anything* relating to permitting." *Id.* at 42a.

Judge Keith's dissent. Judge Keith dissented. He joined Judge Griffin in holding Subsection (E) inapplicable on its face. Pet. App. 45a. Turning to Subsection (F), he refused to read *National Cotton* to authorize original jurisdiction over "all rules '*relating*' to [permitting] procedures, such as the one at issue here," which "merely defines the scope of the term 'waters of the United States.'" *Id.* at 46a.

The Sixth Circuit denied rehearing. Pet. App. 51a-52a. It held merits briefing in abeyance after this Court granted certiorari. Dkt. 171-2 (Jan. 25, 2017).

SUMMARY OF THE ARGUMENT

I. The Sixth Circuit's erroneous exercise of jurisdiction under Section 1369(b) violates the statute's plain language and structure.

A. Contrary to the Sixth Circuit's ruling, it lacks jurisdiction under Section 1369(b)(1)(F). It is undisputed that the WOTUS Rule does *not* "issu[e] or den[y] any permit under section 1342." It therefore lies outside Subsection (F)'s unambiguous text. That fact should end the analysis.

In stretching Subsection (F) to reach all EPA actions that *affect* the granting or denying of Section 1342 permits, Judge McKeague misread this Court's decision in *Crown Simpson Pulp Co.* v. *Costle*, *supra*, which did involve EPA's denial of a permit. His rewriting of Subsection (F) would cover most agency action under the CWA and render superfluous Subsections (A), (C), (D), (E), and (G) of Section 1369(b)(1).

B. A majority of the panel correctly determined that Section 1369(b)(1)(E) does not confer jurisdiction

on the court of appeals. The Rule falls outside Subsection (E)'s plain language because it is not a "limitation," it is not an "other limitation" within the meaning of Subsection (E), and it was not issued "under section 1311." To the contrary, the Rule addresses a phrase in Section 1362(7) that defines the geographic scope of the Act as a whole and thus impacts dozens of CWA provisions just as or more directly than Section 1311. And it limits no action: any limitation arises only when multiple additional statutory terms, like "addition," "pollutant," and "point source," also apply, and when exclusions from permitting requirements are ruled out.

In eschewing a literal reading, Judge McKeague misinterpreted Subsection (E) to extend to any EPA action that merely affects point source operators or permit issuers. In doing so he misread this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, *supra*, which involved industry-wide effluent limitations issued under Section 1311. His analysis has no stopping point, conflicts with this Court's recent holdings, and would render other provisions redundant.

C. Section 1369(b)'s structure confirms the Sixth Circuit's lack of jurisdiction. Congress enacted seven narrow bases for original jurisdiction in the courts of appeals. Its specific focus shows that Congress did not intend Section 1369(b) to provide courts of appeals with original jurisdiction to review all nationwide rule-making under the CWA. Congress's markedly different language in the Clean Air Act's judicial review provisions reinforces this conclusion. There, Congress granted courts of appeals jurisdiction to review all nationally, regionally, or locally applicable regulations. Congress's omission of similarly broad language from the CWA must be given meaning.

D. Legislative history bolsters this conclusion. Although there is scant legislative history surrounding the enactment of Section 1369(b) in 1972, in 1977, Senator Kennedy attempted, with EPA support, to expand Section 1369(b) to cover nationwide rulemaking. He was unsuccessful, yet that same Congress expanded the Clean Air Act's direct judicial-review provisions to include nationwide rulemaking. The negative implication raised by Congress's disparate actions is compelling.

II. Because Section 1369(b)'s plain language resolves this case, there is no need to consider the policy implications of Congress's allocation of jurisdiction. There are, nevertheless, strong policy reasons that support Congress's choice.

A. This Court has emphasized that jurisdictional rules must be clear and administrable. Reading Section 1369(b) textually produces a straightforward jurisdictional standard. Judge McKeague's approach, by contrast, fosters uncertainty over jurisdiction that leads to wasteful litigation. By limiting Section 1369(b) to its text, this Court can put an end to the wasteful practice of duplicative district court and circuit court challenges to agency action under the CWA.

B. Section 1369(b)'s preclusion provision compels a narrow interpretation of the statute. Section 1369(b)(2) prohibits parties in criminal and civil enforcement proceedings from challenging agency action that could have been reviewed under Section 1369(b)(1). A broad interpretation of Section 1369(b)(1) exacerbates the CWA's crushing penalties and creates due process concerns by foreclosing judicial review of unlawful agency action. A broad reading also increases Section 1369(b)(2)'s perverse incentive for parties to petition

for review of all agency action that conceivably falls within Section 1369(b)(1).

C. A plain-language reading of Section 1369(b) allows district courts and multiple courts of appeals to review agency action and thereby improves the quality of judicial decision-making. Disagreement among lower courts increases the probability of correct decisions. And having multiple courts review agency action will ensure full percolation of issues in the lower courts and improve this Court's ability to decide which cases to review. There is no reason to think that multi-court review is less appropriate for agency action than for other cases, such as those involving the meaning or constitutionality of federal statutes.

D. Judge McKeague greatly overstated efficiency gains under his atextual reading of Section 1369(b). Whether review lies under Section 1369(b) or the APA, challenges to important agency action typically will be filed quickly. And parties often coordinate their rule challenges to avoid duplicative litigation. District courts are efficient in reviewing agency action and adept at finding any facts relevant to such review. In any event, efficiency concerns cannot override the plain language of Section 1369(b). This Court should reverse the Sixth Circuit's judgment and remand with instructions to dismiss for lack of jurisdiction.

ARGUMENT

The Sixth Circuit erred in ruling that it had jurisdiction under Section 1369(b). "Section 1369(b) extends only to certain suits challenging some agency actions," which the provision clearly identifies. *Decker*, 133 S. Ct. at 1334. It does not extend to suits challenging the WOTUS Rule.

I. The Sixth Circuit Lacks Jurisdiction Under The Plain Language Of Section 1369(b).

"A statute affecting federal jurisdiction 'must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes.'" *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010). That simple principle resolves this case. As Judges Griffin and Keith explained, the Sixth Circuit lacks jurisdiction under the unambiguous language of Subsections 1369(b)(1)(E) and (F). See Pet. App. 29a (Griffin, J.) ("it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals"), 45a (Keith, J.) ("under the plain meaning of the statute, neither subsection (E) nor (F) * * * confers original jurisdiction on the appellate courts"). The Sixth Circuit should have dismissed the petitions for lack of jurisdiction.

A. The Sixth Circuit Erroneously Exercised Jurisdiction Under Section 1369(b)(1)(F).

We begin with Section 1369(b)(1)(F), under which the Sixth Circuit took jurisdiction. Subsection (F) grants courts of appeals original jurisdiction to review "the Administrator's action * * * in issuing or denying any permit under section 1342." As a matter of plain statutory language and precedent, the Sixth Circuit lacks jurisdiction under Subsection (F).

1. The WOTUS Rule Falls Outside The Unambiguous Language Of Subsection (F).

The WOTUS Rule is *not* an EPA action "issuing or denying any permit under section 1342." Permits under Section 1342 "authoriz[e] the discharge of pollutants" into jurisdictional waters "in accordance with specified conditions." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987).

Section 1342 permits contain "five general types of provisions: technology-based effluent limitations, water-quality-based effluent limitations, monitoring and reporting requirements, standard conditions, and special conditions." THE CLEAN WATER ACT HANDBOOK 33 (Mark A. Ryan ed., 3d ed. 2011). They are enforceable by administrative actions and citizen suits. 33 U.S.C. §§ 1319, 1365.

There are plenty of examples in which EPA *actually* issues or denies a permit under Section 1342; those EPA actions may be directly reviewed by the courts of appeals.[9]

Here, however, it is *undisputed* that the WOTUS Rule does not issue or deny a Section 1342 permit. The panel was unanimous on this point. Judge Griffin observed that the WOTUS Rule "neither issues nor denies a permit" and thus, "[o]n its face, subsection (F) clearly does not apply." Pet. App. 39a. Judge Keith agreed, writing that the Sixth Circuit lacks jurisdiction "under the plain meaning" of Subsection (F). *Id.* at 45a. Even Judge McKeague conceded the point, admitting that our reading is "consonant with the plain language" of Subsection (F). *Id.* at 23a-24a.

The agencies have never claimed that the WOTUS Rule issues or denies a Section 1342 permit. EPA's then-Administrator Gina McCarthy admitted that the Rule does not do so: "[T]he Clean Water Rule is a

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[9] See, *e.g.*, *Nat. Res. Def. Council* v. *EPA*, 808 F.3d 556, 562 & n.4 (2d Cir. 2015) (challenging grant of Section 1342 permit to vessels); *Alaska Eskimo Whaling Comm'n* v. *EPA*, 791 F.3d 1088, 1090-1091 (9th Cir. 2015) (challenging grant of Section 1342 permit to oil and gas exploration facilities); *Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9, 11, 20 (1st Cir. 2012) (challenging grant of Section 1342 permit to sewage treatment plant).

jurisdictional rule. It doesn't result in automatic permit decisions." *The Fiscal Year 2016 EPA Budget: Joint Hearing Before the Subcomm. on Energy & Power & the Subcomm. on Environment & Economy of the House Comm. on Energy & Commerce*, 114th Cong. 70 (Feb. 25, 2015).

The fact that the WOTUS Rule does not issue or deny permits "should end the analysis." Pet. App. 39a (Griffin, J.). Statutory interpretation "begins 'with the language of the statute itself,' and that 'is also where the inquiry should end,' for 'the statute's language is plain.'" *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016); accord *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009) ("when the statutory language is plain, we must enforce it according to its terms"). Because the WOTUS Rule is not an EPA action "issuing or denying any permit under section 1342," jurisdiction is lacking under Section 1369(b)(1)(F).

2. Subsection (F) Does Not Extend To EPA Actions That Merely Affect The Issuing Or Denying Of Permits.

a. Despite conceding a lack of textual support, Judge McKeague interpreted Section 1369(b)(1)(F) to encompass any EPA action that "*impacts* the granting and denying of permits." Pet. App. 21a (emphasis added). He believed that this Court's decision in *Crown Simpson Pulp Co.* v. *Costle* "opened the door to constructions other than a strict literal application" and had allowed "the scope of direct circuit court review [to] gradually expan[d]" over the decades. *Id.* at 17a, 26a. Judge McKeague misread *Crown Simpson*.

In *Crown Simpson*, EPA vetoed Section 1342 permits that a California agency had issued to pulp mills in Eureka, California after EPA had delegated

permitting authority to the State. 445 U.S. at 194-195 & n.3. This Court held that the Ninth Circuit had jurisdiction under Section 1369(b)(1)(F) to review the mills' challenges to EPA's vetoes because the vetoes were "functionally similar to [EPA's] denial of a permit in States which do not administer an approved permit-issuing program" and *had "the precise effect" of denying the permits*. *Id.* at 196 (emphasis added). The Court explained that the CWA did not create "a seemingly irrational bifurcated system" in which "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-197.

EPA has successfully argued in other cases that *Crown Simpson* was superseded by the 1977 amendments to the CWA.[10] Regardless, "'[t]he facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense.'" Pet. App. 40a (Griffin, J.) (quoting *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008)).

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[10] The 1977 amendments gave EPA the power to issue Section 1342 permits directly when States failed to revise State-proposed permits to meet EPA's objections. See *Crown Simpson*, 445 U.S. at 194 n.2. The challenge in *Crown Simpson* preceded the amendments, the impact of which this Court expressly "d[id] not consider." *Ibid.* Courts of appeals have since agreed with EPA that the 1977 amendments supersede *Crown Simpson*'s holding. As the Seventh Circuit explained in *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 874 (7th Cir. 1989), the amendments "fundamentally altered the underpinnings of" *Crown Simpson*. "Under the old system, an EPA objection effectively denied a permit." *Ibid.* The 1977 amendments "allow[ed] the EPA to issue a permit" on revised terms "if the state refuses to modify its proposed permit," so that "an EPA objection to a proposed state permit is no longer 'functionally similar' to denying a permit." *Ibid.*

In *Crown Simpson*, EPA *denied* Section 1342 permits: EPA decided that specific permits proposed by a state agency would not issue.

Crown Simpson thus merely held that EPA's veto of a state-issued permit is the denial of a Section 1342 permit covered by Subsection (F). That unexceptional ruling cannot plausibly be read to authorize a vast expansion of Subsection (F) to "apply to any 'regulations relating to permitting'" (Pet. App. 43a), as Judge McKeague held here. Pet. App. 18a-24a.

Unlike the permit veto at issue in *Crown Simpson*, the WOTUS Rule does not deny permits. The Rule instead purports to define one aspect of the scope of the CWA—its geographical reach. Nothing in *Crown Simpson* suggests that a jurisdictional rule affecting one factor that goes into a determination whether permits are or are not required—along with other factors such as whether there is an "addition" of a "pollutant" from a "point source," or whether any statutory or regulatory exclusion from the permitting requirement applies—is itself a permit denial or issuance covered by Subsection (F).

Reading *Crown Simpson* expansively, as the Eleventh Circuit concluded, "is contrary to the statutory text." *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012). Congress could have written Subsection (F) to apply to any EPA action "relating to permitting" or "affecting when permits may be required under Section 1342." Its failure to "'adopt [that] readily available and apparent alternative strongly supports' the conclusion" that Section 1369(b) does not authorize such broad court of appeals jurisdiction. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017).

b. As Judges Griffin and Keith recognized, it is difficult to imagine any case in which Judge McKeague's expansive rewriting of Subsection (F) would not confer jurisdiction. See Pet. App. 42a (Griffin, J.) (Subsection (F)'s "jurisdictional reach" would have "no end"); *id.* at 47a (Keith, J.) (ruling "expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion").

Most provisions of the CWA have some impact on permitting. Definitions of "pollutant," "person," and "point source," the term "addition," lists of toxic pollutants or new sources, rules about best management practices, definitions of various exclusions to permitting requirements, and countless other regulatory pronouncements would be encompassed by an "*impacts*-the-granting-or-denying-of-permits" test for Subsection (F) jurisdiction. Any EPA action regarding any of those provisions concerns either the scope of permitting authority or the terms on which permits are issued.

If Subsection (F) were expanded beyond the issuance or denial of NPDES permits to cover any EPA action affecting permitting, the "foreseeable consequence" would be that the courts of appeals "would exercise original subject-matter jurisdiction over all things related to the Clean Water Act." Pet. App. 47a (Keith, J.). That "exceptionally expansive view" is "precisely contrary to Section 1369(b)(1)(F)'s grant of jurisdiction." *North Dakota*, 127 F. Supp. 3d at 1051.

c. Because most other CWA provisions relate in some way to permit issuance or denial, Judge McKeague's interpretation also "run[s] headlong into the rule against superfluity." *Lockhart* v. *United States*, 136 S. Ct. 958, 966 (2016). Under his approach,

most of the other designations Congress made in Section 1369(b) would be unnecessary because they would be covered by Subsection (F).

Section 1369(b)(1)(D), for example, grants the courts of appeals jurisdiction to review EPA actions "in making any determination as to a State permit program submitted under section 1342(b)." By its very nature, EPA's determination about the authority of a State to run the NPDES permitting program will "impact the granting and denying of permits" (Pet. App. 21a) and thus satisfy Judge McKeague's standard. If that impact were enough to trigger jurisdiction under Section 1369(b)(1)(F), there would be no need for Section 1369(b)(1)(D).

Other superfluities abound. The "standards of performance," "pretreatment standards" and "effluent limitations" referred to in Subsections (A), (C) and (E) are *incorporated* into, and therefore plainly "impac[t] the granting and denying of," Section 1342 permits. Pet. App. 21a. Satisfying Section 1316's new source performance standards, referenced in Section 1369(b)(1)(A), is a condition of any NPDES permit. 40 C.F.R. § 401.12(i). "[T]he requirements to develop and implement a [Publicly Owned Treatment Works] pretreatment program" under Section 1317, referenced in Section 1369(b)(1)(C), likewise "are included as enforceable conditions in the POTW's NPDES permit." EPA, PERMIT WRITER'S GUIDE at 9-10 (Sept. 2010).[11] "Effluent standards" and "limitations" referred to in Subsections (C) and (E) likewise are written into permits. *Id.* at 5-1 ("NPDES permit writers [are required] to develop technology-based treatment

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[11] https://www.epa.gov/sites/production/files/2015-09/documents/pwm_chapt_09.pdf.

requirements, consistent with CWA section [1311(b)], that represent the minimum level of control that must be imposed in a permit. * * * [P]ermit writers [also] must include in permits additional or more stringent effluent limitations and conditions, including those necessary to protect water quality").[12]

As if that were not enough, the State-developed "individual control strategies" for toxic pollutants that EPA approves or disapproves pursuant to Section 1314(*l*)—referred to in Section 1369(b)(1)(G)—also are integrated into NPDES permits. Indeed, EPA regulations specify that "the term individual control strategy, as set forth in section [1314(*l*)] of the CWA, *means* a final NPDES permit with supporting documentation" showing "that applicable water quality standards will be met * * *." 40 C.F.R. § 123.46(c) (emphasis added).

Accordingly, if Subsection (F) covers all EPA action that impacts permitting, Subsections (A), (C), (E) and (G) are unnecessary because they each concern EPA action on requirements that become NPDES permit conditions. Judge McKeague's interpretation flatly violates the principle that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014). This Court should "avoid" an interpretation that "makes a mess of" Section 1369(b) in this way. *SW Gen.*, 137 S. Ct. at 941.[13]

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[12] https://www.epa.gov/sites/production/files/2015-09/documents/pwm_chapt_05.pdf

[13] Section 1369(b)(1)(B) is not included in our list of subsections rendered superfluous by an "affects permitting" test because the CWA provision referred to there, 33 U.S.C. § 1316(b)(1)(C), never became law. That provision would have given EPA authority to

This Court should hold that the Sixth Circuit erred in exercising jurisdiction under Section 1369(b)(1)(F).

B. The Sixth Circuit Correctly Held That It Lacks Jurisdiction Under Subsection (E).

The Sixth Circuit correctly concluded that Section 1369(b)(1)(E) does not confer jurisdiction. The agencies nonetheless invoke Subsection (E) as an alternative ground for affirmance. Fed. BIO 11. They misread that provision.

1. The WOTUS Rule Falls Outside The Plain Language Of Subsection (E).

Subsection (E) grants jurisdiction to courts of appeals to review "the Administrator's action" in "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." It is undisputed that the WOTUS Rule is *not* an "effluent limitation," which is a "restriction * * * on quantities, rates, and concentrations" of pollutants discharged into navigable waters. 33 U.S.C. § 1362(11); see Pet. App. 8a-9a. It also is undisputed that the Rule was *not* issued under Sections 1312, 1316, or 1345. 80 Fed. Reg. at 37,055; Fed. BIO 13-14. The agencies' sole argument has been that the WOTUS Rule is an "other limitation under section 1311." Gov't Opp. to Mots. to Dismiss 15, Dkt. 58 (Oct. 23, 2015). That argument fails under the "plain and unambiguous text" of Subsection (E). Pet. App. 33a (Griffin, J.).

a. The WOTUS Rule is not a "limitation" in any ordinary sense of the word. Limitation is most naturally defined in Section 1369(b)(1)(E) to mean "a

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make a determination exempting sources from new source standards of performance, and thus would have impacted permitting had it been adopted. It was "eliminated," however, before enactment. S. Conf. Rep. 92-1236, at 3805 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776.

restriction or restraint imposed" by EPA. Webster's Third New International Dictionary 1312 (1971); accord *Friends of the Everglades*, 699 F.3d at 1286 ("Black's Law Dictionary defines a 'limitation' as a 'restriction'"). That definition does not capture the WOTUS Rule. The agencies admitted in promulgating the Rule that it "does not establish any regulatory requirements" and "imposes no enforceable duty" on "the private sector." 80 Fed. Reg. at 37,054, 37,102. It "is definitional only and does not *directly* impose any restriction or limitation." Pet. App. 15a (McKeague, J.); see 80 Fed. Reg. at 37,104 (it is "a definitional rule that clarifies the scope of the Clean Water Act").

The Rule also "is not self-executing." Pet. App. 31a (Griffin, J.). It "operates in conjunction with other sections scattered throughout the Act to define when [the Act's other] restrictions * * * apply." *Ibid.*; accord *id.* at 9a (McKeague, J.) (only "operating in conjunction with other regulations [will the Rule] result in imposition of such limitations").

Furthermore, Judge Griffin recognized, the Rule "is not a 'limitation' on the discharge of pollutants *into* waters of the United States; rather, it sets the jurisdictional reach for whether the discharge limitations even apply in the first place." Pet. App. 32a. It would be "circular" to read a rule establishing the Act's geographical boundaries as a "'limitatio[n]' under" the Act. *Ibid.*

b. The Rule also is not an "other limitation" within the meaning of Subsection (E). Congress's use of the phrase "any effluent limitation or other limitation" makes clear that it intended "other limitation" to have a similar meaning to "effluent limitation." That is true under the *ejusdem generis* canon, which reads a general term following a specific term as "embrac[ing]

only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). It is equally true under the *noscitur a sociis* canon, which "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995). Both canons reflect the common-sense notion that Congress would not have said "any effluent limitation or other limitation" if what it meant was "any limitation." A contrary reading would render "superfluous" the "specific word[s]" *effluent limitation*. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 206 (2012). The Seventh Circuit thus got it right when it "interpret[ed] the 'other limitation' language of subsection 1369(b)(1)(E) as restricted to limitations directly related to effluent limitations." *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 877 (7th Cir. 1989).

Effluent limitations "dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst.*, 890 F.2d at 876. Other limitations like effluent limitations include, for example, non-numerical operational practices or equipment specifications. See *infra* p. 31. But the Rule, a regulatory definition of "waters of the United States," is not remotely similar in nature to an effluent limitation.

The WOTUS Rule is not an "other limitation" for a second reason. As Judge Griffin explained, "the 'limitations' set forth in §§ 1311, 1312, 1316, and 1345 provide the boundaries for what constitutes an effluent or other limitation." Pet. App. 30a. Each of those sections addresses effluent limitations or effluent limitation-like rules. Section 1311 governs "effluent limitations." Section 1312 governs "water quality related

effluent limitations," which are additional effluent limitations that may be imposed where other limitations fail to achieve water quality standards. Section 1316 governs effluent controls for new sources of discharges. And Section 1345 restricts the discharge of sewage sludge. Confirming that these are all effluent limitations or similar to them, all are incorporated into NPDES permits. See 40 C.F.R. § 401.12(i) (permits are conditioned on satisfying requirements of Sections 1311, 1312, and 1316); NPDES PERMIT WRITER'S MANUAL 9-1 (Sept. 2010) ("special conditions" in permits include "NPDES programmatic requirements" such as those concerning "sewage sludge" under Section 1345).

And there are "other limitations" within these sections—limitations that the statute does not describe as "effluent limitations." Section 1311(b)(1)(C) allows EPA to issue "any more stringent limitation[s]" if technology-based effluent limitations cannot "meet water quality standards, treatment standards, or schedules of compliance." Section 1316(a)(1) permits EPA to use "alternatives" to achieve effluent reductions for new sources if "control technology, processes, [and] operating methods" are insufficient. Section 1345(d)(3) provides that, if "it is not feasible to prescribe or enforce a numerical limitation" on pollutants in sewage sludge, EPA may "promulgate a design, equipment, management practice, or operational standard."

Using "other limitation[s]," EPA may issue "highly specific and detailed provisions that direc[t] the point sources to engage in specific types of activity." *Am. Paper Inst.*, 890 F.2d at 877. But those "limitations" are nothing like the WOTUS Rule, which attempts to define where the CWA does and does not apply.

c. The WOTUS Rule does not properly fall "under section 1311." Section 1311, titled "Effluent limitations," sets standards for effluent and other limitations on many subjects, including existing point sources; publicly owned treatment works; toxic pollutants; radiological, chemical, or biological warfare agents; and innovative technologies. This Court held in *du Pont* that Section 1311 "unambiguously provides" EPA with authority to establish "effluent limitations." 430 U.S. at 127. Because Section 1311 plainly "authorizes EPA to issue effluent limitations, the reference in section [1369](b)(1)(E)" to Section 1311 "is readily understandable." *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513, 516 (2d Cir. 1976).

The WOTUS Rule falls outside that readily understandable reference. The phrase "waters of the United States" does not appear in Section 1311. "It is a phrase used in the Act's definitional section, § 1362." Pet. App. 31a (Griffin, J.). Judge Griffin thus reached the unassailable conclusion that WOTUS Rule "does not emanate from" Section 1311. *Ibid.*

Indeed, it is inconceivable that Congress intended a regulatory definition of one phrase in Section 1362 to constitute an EPA action "under section 1311." It takes multiple steps to get from Section 1311 to the phrase "waters of the United States." Section 1311(a) provides that, "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Section 1362(12), in turn, defines the phrase "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." Next, Section 1362(7) states that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." The WOTUS Rule defines a portion of that last sentence, and but

one factor among many that feeds into the Section 1311(a) prohibition.

If that chain of references were enough to make the WOTUS Rule an "other limitation" "under" Section 1311(a), then any regulation addressing the other key terms that appear in Section 1311(a)—"discharge," "pollutant," and "person"—would equally be an "other limitation." And so would EPA action addressing the meaning of the concepts used in Section 1362 in defining those terms. See 33 U.S.C. § 1362(5) (defining "person"); § 1362(6) (defining "pollutant"); § 1362(12) (defining "discharge" as an "addition of any pollutant to navigable waters from any point source"); § 1362(14) (defining "point source").

For example, EPA's Water Transfers Rule, 40 C.F.R. § 122.3(i), clarifies that a water transfer that "conveys or connects waters of the United States" does not involve an "addition" of pollutants to navigable waters and so is not a "discharge" that requires a permit, unless the transfer "subject[s] the transferred water to intervening industrial, municipal, or commercial use." The Eleventh Circuit held that the Water Transfers Rule is not an "other limitation" covered by Section 1369(b)(1)(E) and dismissed petitions for review for want of jurisdiction. *Friends of the Everglades*, 699 F.3d 1280. Challenges to the rule were then litigated in district court in New York. *Catskill Mountains Chapter of Trout Unlimited* v. *EPA*, 8 F. Supp. 3d 500 (S.D.N.Y. 2014), *rev'd*, 846 F.3d 492 (2d Cir. 2017). Under the agencies' theory, that case was litigated in the wrong court: any rule defining what is and is not an "addition" or "discharge" is a limitation under Section 1311 because it governs the meaning of terms central to that provision. The breathtaking scope of that expansion would surely shock the drafters of Section 1369(b). Definitions of the

many individual constituent elements directly or indirectly referred to in Section 1311 are not plausibly "limitations" "under" that provision.

d. Finally, the WOTUS Rule is not an "other limitation under section 1311, 1312, 1316, or 1345" because it is a definitional rule that "applies across the entire Act." Pet. App. 41a (Griffin, J.); see *Rapanos*, 547 U.S. at 742 ("the same definition of 'navigable waters' applies to the entire statute") (plurality).

The phrases "waters of the United States" and "navigable water" are used throughout the CWA. And they have no special relationship to the sections identified in Subsection (E). See *supra* pp. 8-9 (listing examples). "Waters of the United States" does *not* appear in Section 1311, but it is used in Sections 1272, 1293a, 1321, 1322, and 1342. And while Section 1311(a) does *not* contain the term "navigable waters," that term is used in Sections 1251, 1252, 1256, 1272, 1288, 1293a, 1312, 1313, 1314, 1315, 1321, 1322, 1329, 1341, 1342, 1344, 1345, and 1371. The phrase "discharge of any pollutant" in Section 1311(a) appears, with slight variants, in Sections 1251, 1254, 1255, 1281, 1312, 1314, 1315, 1316, 1317, 1342, 1344, 1364, 1370, 1371, and 1375. Thus, the WOTUS Rule affects dozens of CWA provisions *as or more directly* than it affects Section 1311(a).[14]

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[14] For all these reasons, it is immaterial that the agencies cited Section 1311 among the provisions under which they purported to have issued the Rule. 80 Fed. Reg. at 37,055 (asserting that "[t]he authority for this rule is the [CWA]" *in its entirety*, "including" Sections 1311, 1314, 1321, 1341, 1342, 1344, and 1361); cf. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 283 (1978) ("[Congress] did not empower the [EPA] Administrator, after the manner of Humpty Dumpty in Through the Looking-Glass, to make a regulation an 'emission standard' by his mere designation").

Congress could have listed Section 1362(7) within Section 1369(b)'s grant of jurisdiction to the courts of appeals—an omission that "counsels heavily against a finding of jurisdiction." Pet. App. 31a (Griffin, J.). Or Congress could have said that any EPA action "directly or indirectly affecting section 1311" is reviewable in the courts of appeals—in which case *all* EPA actions likely would be reviewable by the courts of appeals. But the language that Congress actually used—EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345"—does not extend to a regulation that defines a phrase in Section 1362(7) which underlies the entire Act and imposes no limitation unless a slew of other statutory and regulatory provisions also apply. The Sixth Circuit correctly held that it lacks jurisdiction under Section 1369(b)(1)(E).

2. *Subsection (E) Does Not Extend To EPA Actions That Merely Impact Point Source Operators Or Regulators.*

a. In casting the sole vote to exercise jurisdiction under Section 1369(b)(1)(E), Judge McKeague construed that provision "not in a strict literal sense," but instead to cover any EPA action "whose practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." Pet. App. 17a, 26a. Judge McKeague claimed support for this atextual interpretation in this Court's *du Pont* decision, which he said "eschewed a strict, literal reading" and granted courts "a license to construe Congress's purposes in § 1369(b)(1) more generously than its language would indicate." *Id.* at 10a, 13a. That view of *du Pont* is incorrect.

Du Pont is a straightforward application of Section 1369(b)(1)(E)'s plain language. Petitioners there

challenged industry-wide effluent limitations issued under Section 1311. 430 U.S. at 124. They argued that EPA lacked authority to impose binding industry-wide effluent limitations by regulation under Section 1311, that EPA could only issue "guidelines" under Section 1314, and that court of appeals jurisdiction was therefore lacking under Subsection (E). *Id.* at 124-125. The jurisdictional issue was thus "subsidiary" to and "intertwined with the issue of EPA's power to issue" binding industry-wide regulations under Section 1311. *Ibid.* This Court first held that Section 1311 empowered EPA to impose industry-wide effluent limitations by regulation. *Id.* at 126-136. And that holding "necessarily resolve[d] the jurisdictional issue" because Section 1369(b)(1)(E) "unambiguously authoriz[es]" the court of appeals to review Section 1311 effluent limitations. *Id.* at 136.

This Court in *du Pont* also rejected petitioners' fallback jurisdictional argument that Section 1369(b)(1)(E)'s reference to "section 1311" should be understood to refer only to Section 1311(c), which allows for individual variances from effluent limitations. 430 U.S. at 136. The Court explained that, "in other portions of [Section 1369], Congress referred to specific subsections" and "presumably would have specifically mentioned" Section 1311(c) if petitioners' reading were correct. *Ibid.* The Court also noted that its holding avoided "the truly perverse situation in which" courts of appeals could review NPDES permitting decisions under Section 1342 "but would have no power of direct review of the basic regulations" under Section 1311 that "govern[ed] those individual actions." *Ibid.* And the Court had "no doubt that Congress intended review of" effluent limitations on existing sources under Section 1311 "to be had in the same forum" as review of effluent limitations on new

sources under Section 1316 (*id.* at 136-137)—an obvious conclusion because Section 1369(b)(1)(E) expressly applies to "effluent limitations" issued "under section 1311" *and* "1316."

Judge McKeague misread *du Pont*. He believed that "the challenged regulation [in *du Pont*] was promulgated under" a provision that was not one of the "enumerated sections" listed in Subsection (E). Pet. App. 10a. But that was *petitioners'* argument in *du Pont*, which this Court rejected. This Court held instead that EPA had issued the challenged regulations establishing effluent limitations under Section 1311. 430 U.S. at 126-136. Judge McKeague also mistakenly claimed that this Court "eschewed a strict, literal reading" of Section 1369(b)(1)(E). Pet. App. 10a. In fact, this Court applied Subsection (E)'s "unambiguou[s]" text. 430 U.S. at 136. To be sure, this Court *mentioned* policy, but the "policy reason came *after* a plain textual rejection of the industry's position." Pet. App. 35a (Griffin, J.).

As Judge Griffin explained, it is "a far stretch to take [*du Pont*'s] dicta and expand it" to "find jurisdiction proper when a regulation's 'practical effect' only sets forth 'indirect' limits." Pet. App. 35a. "[U]nlike" *du Pont*, the agencies here "admit they have not promulgated an effluent limitation." *Ibid.* *Du Pont* does not authorize Sixth Circuit jurisdiction under Subsection (E)'s "other limitation" provision.

b. There is no stopping point to Judge McKeague's logic. Nearly any EPA action under the CWA can be said to "*indirectly* produce various limitations on point-source operators and permit issuing authorities." Pet. App. 17a. For example, an EPA administrative enforcement order under Section 1319(a)(1) certainly will impact the permit holder and the permitting

authority and has no more tenuous a connection to Section 1311 than the WOTUS Rule. Judge McKeague's ruling therefore would vest the courts of appeals with exclusive jurisdiction to review the order. Yet that result contradicts this Court's holding in *Sackett* v. *EPA*, 566 U.S. 120 (2012), that landowners may challenge EPA's administrative enforcement orders in the district courts under the APA.

Similarly, Section 1313 authorizes EPA to approve or promulgate water quality standards. 33 U.S.C. § 1313(b), (c)(3). Those standards impact point source operators and permitting authorities indirectly under Section 1311, because effluent limitations must be designed to meet water quality standards. *Id.* § 1311(b)(1)(C). Yet the courts of appeals have uniformly *agreed with EPA* that Section 1313 standards do not fall within Section 1369(b)(1)(E). See *Friends of Earth* v. *EPA*, 333 F.3d 184, 186 (D.C. Cir. 2003); *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1311 (9th Cir. 1992); *Bethlehem Steel*, 538 F.2d at 514.

c. Judge McKeague's reading also renders superfluous parts of Subsection (E). Section 1312 water-quality-based effluent limitations impact point source operators and regulators indirectly under Section 1311 "because [Section 1312 limitations] are limitations 'necessary to meet water quality standards'" under Section 1311(b)(1)(C). *Friends of Earth*, 333 F.3d at 190. Yet "section 1369(b)(1) *expressly* provides for original appellate court review of section 1312 actions," with the result that Judge McKeague's reading renders that Subsection's "specific reference to section 1312 duplicative and unnecessary." *Ibid.* Judge McKeague's reading fails to "compor[t] with the presumption 'that statutory language is not superfluous.'" *McDonnell* v. *United States*, 136 S. Ct. 2355, 2369 (2016).

d. To be sure, some courts, like Judge McKeague, have read *Crown Simpson* and *du Pont* to authorize "a practical rather than a cramped construction" of Section 1369(b)(1) that expands courts of appeals' jurisdiction beyond EPA's issuance or denial of permits or imposition of effluent-like limitations. *NRDC* v. *EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982). In *NRDC*, the court held that a challenge to Consolidated Permit Regulations that established "procedures for issuing or denying NPDES permits" fell under Subsection (F) because they were "'a limitation on point sources and permit issuers'" and "'a restriction on the untrammeled discretion of the industry.'" *Id.* at 402, 405. Similarly, in *VEPCO* v. *Costle*, 566 F.2d 446, 450 (4th Cir. 1977), the court held that standards regulating the construction of cooling water intakes were an "other limitation" because they set forth "information that must be considered in determining the type of intake structures that individual point sources may employ."

These influential decisions—from a period when courts claimed more authority to deviate from plain statutory language than is now the case—can be parsed, explained, and distinguished. See, *e.g.*, *Friends of the Earth* v. *EPA*, 333 F.3d 184, 191 n.15 (D.C. Cir. 2003). But it is soundest instead to reject their approach. Straying from the plain terms Congress used has only led to uncertainty over jurisdiction, duplicate filings and wasteful litigation, and judicial contortions in which appeals to "policy" are necessary to override the "technical criteria" specified in Section 1369(b)(1). *NRDC*, 673 F.2d at 405 n.15. More recent decisions rely on the "plain language," canons of construction, and "structural" guides to meaning that we advocate here. *Friends of the Earth*, 333 F.3d at 189-192 (holding that a Section 1313(d) total maximum daily load was not an "other limitation" within Subsection

(E)); *Friends of the Everglades*, 699 F.3d at 1286-1288 (rejecting EPA contention that water transfers rule fell under Subsections (E) and (F) as "contrary to the statutory text").

C. Congress's Specific And Narrow Focus In Section 1369(b) Confirms That The Sixth Circuit Lacks Jurisdiction.

Congress "drafted seven carefully defined bases for original jurisdiction in the appellate courts" (Pet. App. 46a (Keith, J.)), which embody "fine" "distinctions." *Longview Fibre*, 980 F.2d at 1313. Its use of this structure "justif[ies] the inference" that a general grant of jurisdiction to courts of appeals over all agency action under the CWA was "excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). As the Second Circuit put it, "the complexity and specificity" of Section 1369(b) "suggests that not all [EPA] actions" are reviewable in the courts of appeals; Congress's "specifying particular actions and leaving out others" is incompatible with cramming most EPA action under the CWA into Section 1369(b). *Bethlehem Steel*, 538 F.2d at 517; see also *Longview Fibre*, 980 F.2d at 1313 ("No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated").

The need to interpret Section 1369(b) narrowly according to its plain terms takes on special force because "Congress well knows how to" grant the courts of appeals broad jurisdiction to review EPA's actions: "In [an]other statut[e], using different language, it has done just that." *Mathis* v. *United States*, 136 S. Ct. 2243, 2252 (2016).

In the CWA's sister statute, the Clean Air Act, Congress authorized the courts of appeals to review specific categories of agency action—some that must be reviewed by the D.C. Circuit and others that must be reviewed by the regional circuits. 42 U.S.C. § 7607(b)(1). Congress then went further by granting the D.C. Circuit original jurisdiction to review "*any other nationally applicable regulations* promulgated, or final action taken, by the Administrator under this chapter" and granted regional circuits jurisdiction to review "*any other final action* of the Administrator under this chapter * * * *which is locally or regionally applicable*." *Ibid.* (emphases added). Similarly broad jurisdictional language is conspicuously absent from the CWA.

Congress's decision to use different "judicial review" language in the Clean Air Act is yet another reason "counseling against construing" Section 1369(b) as embracing all nationally applicable rulemaking under the CWA. *United States* v. *Bean*, 537 U.S. 71, 76 n.4 (2002) ("'The use of different terms within related statutes generally implies that different meanings were intended'").

D. The Legislative History Suggests That Congress Did Not Intend The Courts Of Appeals To Review All Nationwide Rules.

Section 1369(b) was originally enacted as part of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500. "The legislative history for the 1972 amendments reveals little about Congress's intent behind the CWA's judicial review provisions." Allison LaPlante *et al.*, *On Judicial Review Under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center*: What We Now Know*

and What We Have Yet to Find Out, 43 ENVTL. L. 767, 776 (2013).

The agencies have repeatedly cited a fragment of an early House Report stating that the purpose of Section 1369(b) was "to establish a clear and orderly process for judicial review." H.R Rep. No. 92-911, at 136 (1972), *reprinted in* 1 Leg. Hist. of the Water Pollution Control Act of 1972 at 823 (Comm. Print 1973); *e.g.*, Fed. BIO 4-5, 19. That phrase by itself says nothing about what process is clear and orderly. And the agencies failed to acknowledge that the House at that time had proposed placing judicial review "in the district court[s]," and had emphasized that "the inclusion of section [1369] is not intended to exclude judicial review" that is "otherwise permitted by law," including under the APA. H.R. Rep. No. 92-911, at 136 (1972), 1 Leg. Hist. at 823. The House Report does not suggest that Congress intended that the courts of appeals would review nationwide regulations other than those it narrowly specified in Section 1369(b).

More illuminating are Congress's actions in passing the 1977 amendments to the CWA, which modified many parts of the Act. See Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (Dec. 27, 1977). Congress did *not* amend Section 1369. And it was not for lack of trying. With the EPA Administrator's "strong support," Senator Kennedy introduced an amendment that would have broadened Section 1369(b) to cover "national regulations promulgated under the [CWA]" and would have required those regulations to be challenged in the D.C. Circuit. 123 Cong. Rec. S. 26,754, 26,756 (Aug. 4, 1977). Senator Kennedy emphasized several times during the debate that his proposed amendment was similar to the Clean Air Act's judicial review provision. *Id.* at 26,755-56, 26,759, 26,761. He encountered strong opposition,

including concern about trying to "nickel and dime the district courts of the United States out of business." *Id.* at 26,759. The amendment was tabled and never enacted. *Id.* at 26,761.

Three days later, the Clean *Air* Act Amendments of 1977 became law, with modified judicial review language. See *supra* p. 41; Pub. L. No. 95-95, 91 Stat. 685, 776 (Aug. 7, 1977). This Court "cannot ignore Congress' decision to amend [the Clean Air Act's] relevant provisions but not make similar changes to the [CWA]." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Ibid.* Indeed, "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted,'" as they were here. *Id.* at 175.

In short, all considerations based on the text, structure, related statutes, and legislative history lead to the same place: the WOTUS Rule falls outside of Section 1369(b)(1)'s provisions, and the Sixth Circuit erred in exercising jurisdiction.

II. Policy Considerations Favor Interpreting Section 1369(b) Textually To Exclude The WOTUS Rule.

The agencies contend that rules that are national in scope "are best reviewed directly in the courts of appeals." Dkt. 58, at 57 (Oct. 23, 2015). They also say they prefer to avoid having to defend rules in more than one forum, to husband their resources and avoid the risk that different courts will reach different conclusions. *Id.* at 58-59. Even if these policy considerations were valid, they "could not overcome the clarity [evident] in the statute's text." *Kloeckner* v.

Solis, 133 S. Ct. 596, 607 n.4 (2012). But there are stronger policy reasons for interpreting Section 1369(b) according to its plain text.

A. Interpreting Section 1369(b) Textually Promotes Jurisdictional Clarity.

1. This Court has emphasized countless times that "jurisdictional rules should be clear." *Lapides*, 535 U.S. at 621. "[A]dministrative simplicity is a major virtue in a jurisdictional statute." *Hertz*, 559 U.S. at 94. "[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Ibid.* Litigants benefit because clearer jurisdictional lines "promote greater predictability." *Ibid.* "[J]urisdictional rule[s]" should be interpreted in such a way as to provide litigants and courts with "clear guidance about the proper forum for [a particular claim] at the outset of the case." *Elgin* v. *Dep't of the Treasury*, 132 S. Ct. 2126, 2135 (2012).

Nebulous standards, by contrast, "invit[e] greater litigation"—as WOTUS Rule litigation illustrates. *Hertz*, 559 U.S. at 94. They "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.* "Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004).

In light of those concerns, this Court "place[s] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz*, 559 U.S. at 80. A standard that is "more straightforward and administrable than the alternative" best "serves the goals [that this Court has] consistently underscored in interpreting jurisdictional

statutes." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1573 (2016).

Our textual reading of Section 1369(b) offers a straightforward standard to determine whether jurisdiction exists under Section 1369(b)(1)(F). A court need ask only whether EPA has issued or denied a Section 1342 permit. If, as in this case, EPA has made no determination regarding a specific permit, then there is no jurisdiction under Section 1369(b)(1)(F). It is similarly straightforward to decide jurisdiction under Section 1369(b)(1)(E). A court need ask only whether EPA has issued an effluent or effluent-like limitation under Sections 1311, 1312, 1316, or 1345. If EPA has not issued an effluent or similar limitation, or if its action arises out of another section of the CWA or out of the statute as a whole (see 80 Fed. Reg. at 37,055), then the courts of appeals lack jurisdiction under Section 1369(b)(1)(E).

By contrast, Judge McKeague's "'functional' approach," which attempts to divine how "Congress's manifest purposes are best fulfilled" (Pet. App. 4a), or the *NRDC* court's "practical rather than a cramped" construction, produce uncertainty and endless litigation. Courts and parties will puzzle over whether "Congress must have intended" for review by "the circuit courts" based on "the *indirect* effect" of EPA action (Pet. App. 15a), and over what result is "practical." Those "approach[es are] at war with administrative simplicity" (*Hertz*, 559 U.S. at 92), leading to a jurisdictional "line [that] is hazy at best and incoherent at worst." *Elgin*, 132 S. Ct. at 2135.

2. To say that the meaning of each subsection in Section 1369(b) is plain on its face is not to say that the list is coherent or readily explicable by some overarching theory about what issues are best resolved at

which level of the court system. The list can be criticized as odd or arbitrary.

For example, the reference in Subsection (B) to Section 1316(b)(1)(C), though that provision was dropped in conference, suggests a lack of care in drafting.

Another example. It is unclear why review of EPA's issuance or denial of NPDES permits should belong in the courts of appeals under Subsection (F), but review of agency action in issuing or denying dredged or fill permits under Section 1344 remains in the district courts. As the agencies have pointed out (Dkt. 58 at 45), though the Corps generally processes dredge or fill permits, nevertheless "EPA plays a substantial role." Yet even EPA actions under Section 1344 that are parallel to NPDES program actions covered by Section 1369(b) are left to the district courts. See 33 U.S.C. § 1344(h) (EPA determination as to adequacy of State program), § 1344(i) (EPA authority to issue permit after disapproval of proposed State permit), § 1344(c) (EPA may determine in advance of permit application to prohibit or restrict use of a location for discharges).

Section 1369(b) draws other distinctions that are hard to fathom. Review of EPA's promulgation of a standard of performance under Section 1316 goes to the courts of appeals (Subsection (A)), as does its determination as to the adequacy of a State NPDES program (Subsection (D)). Yet an EPA determination under Section 1316(c) to approve a State procedure for applying and enforcing standards of performance is not listed in Section 1369(b) and hence is reviewed by the district courts.

But Section 1369(b) is not unusual in this regard. "[T]he *United States Code* is replete with thousands of compromises dividing initial review of agency decisions

between district and circuit courts." Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 2 (2015). Congress generally "declines to explain its choice of forum," and "Congress's choices have varied dramatically—without apparent rhyme or reason—from statute to statute, year to year, and even within particular legislation." *Id.* at 15-16. "Horse Protection Act regulations can be challenged in district court, but adjudications go to the circuit court." *Id.* at 17. Department of Health and Human Services decisions regarding the approval of Medicaid state plans are challenged in district court, except that a state may challenge an adverse decision in the court of appeals. *Ibid.* Bizarre examples pepper the U.S. Code. See *id.* at 15-19. The sorts of "anomal[ies]" that the agencies want to try to eradicate by adoption of a "pragmatic construction" that looks to a statute's "objectives" (Fed. BIO 11) would lead to judicial rewriting of thousands of jurisdictional statutes. It would be an endless and ultimately arbitrary task for the courts to try to impose rationality by deducing how "Congress's manifest purposes are best fulfilled." Pet. App. 4a. The only way to make sense of jurisdictional provisions, and give parties and courts predictability, is to *apply the language as written.*

"[T]he necessity of having a clea[r] rule" governing the CWA is compelling. *Hertz*, 559 U.S. at 96. As this Court observed in *du Pont*, parties have been filing duplicative district and circuit court challenges to EPA actions since 1974. 430 U.S. at 123 n.11. Far too much ink has been spilled, and far too many public and private resources wasted, in attempting to infer whether Congress would have wanted the courts of appeals to review EPA actions that fall outside Section 1369(b)'s plain language. The Court should put an end

to this misguided practice by limiting Section 1369(b) to its text.

B. A Narrow Reading Is Necessary Due To Section 1369(b)'s Preclusion Provision.

The Court should reject the agencies' invitation to read Section 1369(b) broadly because "[r]eviewability under section 1369 carries a peculiar sting." *Longview Fibre*, 980 F.2d at 1313. Parties have "120 days" to challenge EPA actions that fall within Section 1369(b)(1) unless the challenge is "based solely on grounds which arose after such 120th day." Actions that could have been challenged "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id.* § 1369(b)(2); *Decker*, 133 S. Ct. at 1334 (if "available," review under Section 1369(b) is "exclusive").

Armed with Section 1369(b)'s preclusion provision, the Government might criminally prosecute someone for violating an *unlawful* EPA regulation while attempting to bar that person from challenging the regulation's lawfulness. And a conviction could result in "substantial" penalties. *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). Negligent violations of the Act are punishable by up to 2 years' imprisonment, and knowing violations are punishable by fines up to $50,000 per day and up to 3 years in prison. 33 U.S.C. § 1319(c)(1)-(2). "[T]he consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring).

Accepting the Sixth Circuit's judgment would "have a significant bearing on whether the Clean Water Act comports with due process." *Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring); see also *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) (noting "due process"

concerns if the CWA barred landowners from challenging enforcement orders). It is "totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation" would "have knowledge of its promulgation or familiarity with or access to the Federal Register." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring). It is even more unrealistic to assume that these persons and entities will monitor and then challenge within 120 days all CWA regulations that, years or decades later, might result in a "civil or criminal proceeding for enforcement" against them. 33 U.S.C. § 1369(b)(2). The Court accordingly should interpret Subsections (E) and (F) "as written to avoid the significant constitutional * * * questions raised by [Judge McKeague's] interpretation." *SWANCC*, 531 U.S. at 174.

The rule of lenity also requires a narrow reading of Section 1369(b) because its preclusion provision explicitly applies in a "criminal prosecution." See *Adamo Wrecking*, 434 U.S. at 285 (applying rule of lenity in interpreting Clean Air Act's preclusion provision); *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (applying rule of lenity in a civil case "[b]ecause we must interpret the statute consistently" in both a "criminal or noncriminal context"). Thus, if there is even "some doubt" as to the meaning of Subsections (E) and (F), that doubt must be resolved in favor of a narrow interpretation to avoid prejudicing criminal defendants. *Adamo Wrecking*, 434 U.S. at 285.

For pragmatic reasons as well, Section 1369(b)'s preclusion provision should "dissuad[e] [the Court] from reading § [1369](b)(1) broadly." *Am. Paper Inst.*, 882 F.2d at 289. As Judge Easterbrook explained, "the more [a court] pull[s] within § [1369](b)(1), the more arguments will be knocked out by inadvertence later

on—and the more reason firms will have to petition for review of everything in sight." *Ibid.* This Court should "express great reluctance to multiply the occasions for review [under Section 1369(b)(1)], especially when careful counsel must respond to the combination of uncertain opportunities for review and § [1369](b)(2) by filing buckshot petitions." *Roll Coater*, 932 F.2d at 671. The best way to do so is by reading Section 1369(b) textually.

C. A Narrow Reading Offers Parties, Agencies, And Courts The Benefits Of Multilateral Review Of Agency Rulemaking.

Under the Sixth Circuit's ruling, challenges to important CWA regulations would be funneled to a single court of appeals, without the benefit of initial consideration by the district courts or the opinions of other federal courts of appeals on the same issues. On some of the most critical issues under the CWA—like the regulation here—the quality of legal decision-making, and of this Court's ability to decide which cases to review, would be diminished.

Percolation among lower courts "helps to explain and formulate the underlying principles" this Court "must consider." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2597 (2015). It also "winnows out the unnecessary and discordant elements of doctrine." *California* v. *Carney*, 471 U.S. 386, 400-401 (1985) (Stevens, J., dissenting) (citing Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS 179 (1921)). Accordingly, this Court typically "permit[s] several courts of appeals to explore a difficult question before [it] grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984).

The benefits of multi-court review accrue as clearly in the review of administrative rules as in other types of cases. See Richard L. Revesz, *Specialized Courts and*

the Administrative Lawmaking System, 138 U. PA. L. REV. 1111, 1155 (1990) (explaining "[w]hy [we] should * * * take uniform administrative decisions and subject them to review in the various regional circuit courts under a system that makes it possible for these courts to disagree with one another"). These benefits include that "the possibility of intercircuit disagreement provides a simple device for signaling that certain hard cases are worthy of additional judicial resources"; that "the doctrinal dialogue that occurs when a court of appeals addresses the legal reasoning of another and reaches a contrary conclusion * * * improves the quality of legal decisions"; and that exploration of an issue by multiple courts aids this Court "both in its consideration of the legal merits of an issue and in its case selection decisions." *Id.* at 1156-1157.

Thus, any judicial disagreements that may arise from initial consideration in multiple district courts "increase the probability of a correct disposition" (*Atchison, Topeka & Santa Fe Ry. Co.* v. *Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring)), and tee up issues more thoroughly for this Court's consideration. There is nothing about agency regulations that makes this process less appropriate for rule challenges than for other types of cases, like those involving the meaning or constitutionality of federal statutes. The benefits of multi-court consideration would be lost if Section 1369(b) were stretched beyond the defined categories of agency action that Congress designated for original court of appeals review.

Furthermore, Section 1369(b) must be read in light of the default rule that Congress established in the APA, which is that agency action is subject to multilateral judicial review. "[I]n the absence or inadequacy" of a "special statutory review proceeding," any "person suffering legal wrong because of agency

action" is "entitled to judicial review" "in a court of competent jurisdiction." 5 U.S.C. §§ 702-703. A plaintiff generally may file suit where it resides. See 28 U.S.C. §§ 1331, 1391(e); see also *Bowen* v. *Massachusetts*, 487 U.S. 879, 904 (1988) (Congress "inten[ded] that [the APA] cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation").

In the absence of a clear statement from Congress in Section 1369(b), the Sixth Circuit should not have upended the APA judicial review process. This Court should restore APA review to CWA rulemaking outside the specific categories that Congress identified in Section 1369(b).

D. Judge McKeague's Efficiency Arguments Are Unpersuasive.

Judge McKeague believed that review of the WOTUS Rule under Section 1369(b) was necessary for "efficiency, judicial economy, clarity, uniformity and finality" (Pet. App. 23a), considerations urged too by the agencies. Fed. BIO 15-16. Those policy arguments carry little weight in practice.

Despite the APA's lengthier statute of limitations, in most cases rule challenges will be initiated very soon after the rule's promulgation. The most likely challengers are often closely involved in the notice and comment process and eager to mount challenges quickly, before a harmful rule takes effect. As a practical matter, an APA challenge is likely to come within days or weeks, not years. That is especially true for rules that have sweeping nationwide impacts, like the WOTUS Rule. The agencies issued the Rule in June 2015, and within that same year 16 district court

challenges were filed, most of them very quickly after the Rule's issuance. See *supra* p. v.

Parties may coordinate their challenges to EPA actions to avoid litigation in many different forums. For example, in litigation over EPA's Water Transfers Rule, 40 C.F.R. § 122.3(i), some environmental organizations quickly filed an APA challenge in the Southern District of New York. Nine States and a Canadian province filed a second challenge in the same court, which consolidated the actions. Eleven States, New York City, many Western water districts, and others intervened as defendants in support of the rule. See *Catskill Mountains*, 846 F.3d at 500-501 & n.6, 505-506. Environmental groups that had filed APA actions in the Southern District of Florida voluntarily dismissed those suits and intervened as plaintiffs in the New York suits. See Joint Notice of Voluntary Dismissal, *Friends of the Everglades* v. *EPA*, No. 1:08-cv-21785 consol. (S.D. Fla. Nov. 13, 2012). Thus, although multiple parties from across the country challenged the same EPA regulation, only one district court ruled on the merits of their challenges. There is reason to expect that, where CWA rule challenges proceed in district court, there will be some degree of voluntary consolidation.

It is in any event hardly certain that Judge McKeague's ruling increases efficiency. "[T]he case for direct review in circuit courts has little in the way of theoretical or empirical heft." Mead & Fromherz, *supra*, 67 ADMIN. L. REV. at 5. And "district courts are generally as capable—and usually more efficient—than their counterparts at the circuit level." *Ibid.* It is also more efficient to have the district court rather than the appellate court resolve factual disputes, such as whether the challenger has Article III standing and whether the agency has prepared a complete record.

Id. at 29, 55. In this case, the parties spent months litigating whether the agencies had provided a complete record, which caused the Sixth Circuit to hold the briefing deadlines in abeyance. See Motions to Supplement Certified Record, Dkts. 103-105 (July 8, 2016); Opinion & Order on Administrative Record, Dkt. 119 (Oct. 4, 2016); see also Order, Dkt. 116 (Sept. 22, 2016); see also Mead & Fromherz, *supra*, 67 ADMIN. L. REV. at 29-30. For these and other reasons, commentators have concluded that, all things considered, district courts generally should undertake original review of agency actions. *Id.* at 22-59.

Regardless, efficiency concerns carry no weight in this case because "policy arguments cannot supersede the clear statutory text." *Universal Health Servs., Inc.* v. *United States*, 136 S. Ct. 1989, 2002 (2016). "[N]o law pursues its purpose at all costs, and ... the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana*, 558 U.S. at 252. Jurisdiction is "governed by the intent of Congress" as expressed in the statutory text, "and not by any views [courts] may have about sound policy." *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 746 (1985).[15] Stretching the text of Section 1369(b) past its breaking point to increase efficiency undermines the very purpose of the APA. "The APA's presumption

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[15] Judge McKeague erroneously read this Court's decision in *Florida Power* to establish in all cases a "strong preference" in favor of "direct circuit court review of agency action." Pet. App. 23a. His reliance on that "non-Clean Water Act case" is "unavailing," as Judge Griffin explained. *Id.* at 43a. *Florida Power* found the relevant "statute ambiguous on its face." 470 U.S. at 737. And its "holding depended on its lengthy exegesis of those specific statutes; nowhere did the Court intimate that it was ruling as a matter of general administrative procedure." *Nader* v. *EPA*, 859 F.2d 747, 754 (9th Cir. 1988).

of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 132 S. Ct. at 1374. Section 1369(b)'s plain language controls, and that language does not vest the Sixth Circuit with jurisdiction to review the WOTUS Rule.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted.

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD M. CLAMAGE
JED GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

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ADDENDUM OF STATUTORY PROVISIONS

33 U.S.C. § 1311. Effluent Limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment

standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

* * * * *

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

* * * * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

* * * * *

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an

innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

* * * * *

33 U.S.C. § 1312. Water Quality Related Effluent Limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(*l*) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

* * * * *

33 U.S.C. § 1314. Information and Guidelines

* * * * *

(*l*) Individual control strategies for toxic pollutants

(1) State list of navigable waters and development of strategies

Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection—

(A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

(B) a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially to discharges from point sources of any toxic pollu-

tants listed pursuant to section 1317(a) of this title;

(C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source; and

(D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy.

(2) Approval or disapproval

Not later than 120 days after the last day of the 2-year period referred to in paragraph (1), the Administrator shall approve or disapprove the control strategies submitted under paragraph (1) by any State.

(3) Administrator's action

If a State fails to submit control strategies in accordance with paragraph (1) or the Administrator does not approve the control strategies submitted

by such State in accordance with paragraph (1), then, not later than 1 year after the last day of the period referred to in paragraph (2), the Administrator, in cooperation with such State and after notice and opportunity for public comment, shall implement the requirements of paragraph (1) in such State. In the implementation of such requirements, the Administrator shall, at a minimum, consider for listing under this subsection any navigable waters for which any person submits a petition to the Administrator for listing not later than 120 days after such last day.

* * * * *

33 U.S.C. § 1316. National Standards of Performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources * * *.

* * * * *

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Adminis-

trator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

* * * * *

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

* * * * *

33 U.S.C. § 1317 – Toxic And Pretreatment Effluent Standards

(a) Toxic Pollutant List; Revision; Hearing; Promulgation of Standards; Effective Date; Consultation.

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. * * *

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2) and 1314(b)(2) of this title.

* * * * *

(b) Pretreatment Standards; Hearing; Promulgation; Compliance Period; Revision; Application to State and Local Laws.

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by

such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, of otherwise is incompatible with such works. * * *

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

* * * * *

(c) New Sources of Pollutants into Publicly Owned Treatment Works.

In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall pre-

vent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

* * * * *

33 U.S.C. § 1342. National Pollutant Discharge Elimination System

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * * * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

* * * * *

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

* * * * *

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall with-

draw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

* * * * *

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a per-

mit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

* * * * *

(*l*) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material,

intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities

(A) NPDES permit requirements for silvicultural activities

The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

* * * * *

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

* * * * *

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and manage-

ment practices and treatment requirements, as appropriate.

* * * * *

33 U.S.C. § 1345. Disposal or Use of Sewage Sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

* * * * *

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for

sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

(ii) Final regulations

Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

(C) Review

From time to time, but not less often than every 2 years, the Administrator shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

(D) Minimum standards; compliance date

The management practices and numerical criteria established under subparagraphs (A), (B), and (C) shall be adequate to protect public health and the environment from any reasonably anticipated adverse effects of each pollutant. Such regulations shall require compliance as expeditiously as practicable but in no case later than 12 months after their publication, unless such regulations require the construction of new pollution control facilities, in which case the regulations shall require compliance as expeditiously as practicable but in no case later than two years from the date of their publication.

(3) Alternative standards

For purposes of this subsection, if, in the judgment of the Administrator, it is not feasible to prescribe or enforce a numerical limitation for a pollutant identified under paragraph (2), the Administrator may instead promulgate a design, equipment, management practice, or operational standard, or combination thereof, which in the Administrator's judgment is adequate to protect public health and the environment from any reasonably anticipated adverse effects of such pollutant. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

* * * * *

(f) Implementation of regulations

(1) Through section 1342 permits

Any permit issued under section 1342 of this title to a publicly owned treatment works or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section, unless such requirements have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], part C of the Safe Drinking Water Act [42 U.S.C.A. § 300h et seq.], the Marine Protection, Research, and Sanctuaries Act of 1972 [33 U.S.C.A. § 1401 et seq.], or the Clean Air Act [42 U.S.C.A. § 7401 et seq.], or under

State permit programs approved by the Administrator, where the Administrator determines that such programs assure compliance with any applicable requirements of this section.

* * * * *

U.S.C. § 1369. Administrative Procedure and Judicial Review

* * * * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such

date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * * * *

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT - 5 2016
OFFICE OF THE CLERK

No. 16-299

In the
Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,
v.
DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENTS' BRIEF IN SUPPORT OF CERTIORARI ON BEHALF OF AGROWSTAR, LLC; AMERICAN EXPLORATION & MINING ASSOCIATION; CALIFORNIA CATTLEMEN'S ASSOCIATION; COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH; DUARTE NURSERY, INC.; GEORGIA AGRIBUSINESS COUNCIL, INC.; GREATER ATLANTA HOMEBUILDERS ASSOCIATION, INC.; HAWKES COMPANY, INC.; LPF PROPERTIES, LLC; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO FEDERAL LANDS COUNCIL; NEW MEXICO WOOL GROWERS, INC.; OREGON CATTLEMEN'S ASSOCIATION; PIERCE INVESTMENT COMPANY; R. W. GRIFFIN FEED, SEED & FERTILIZER, INC.; SOUTHEASTERN LEGAL FOUNDATION, INC.; AND WASHINGTON CATTLEMEN'S ASSOCIATION

STEVEN J. LECHNER
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
lechner@mountainstateslegal.com

M. REED HOPPER
Counsel of Record
ANTHONY L. FRANÇOIS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
MRH@pacificlegal.org
Counsel for Respondents

Additional Counsel Listed on Inside Cover

RICHARD A. HORDER
JENNIFER A. SIMON
Kazmarek Mowrey Cloud
Laseter LLP
1230 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30309
Telephone: (404) 812-0126
rhorder@kmcllaw.com
jsimon@kmcllaw.com

KIMBERLY S. HERMANN
Southeastern Legal Foundation, Inc.
2255 Sewell Mill Road
Suite 320
Marietta, Georgia 30062
Telephone: (770) 977-2131
khermann@southeasternlegal.org

QUESTION PRESENTED

On June 29, 2015, the Environmental Protection Agency and U.S. Army Corps of Engineers issued a joint rule redefining "waters of the United States" subject to the Clean Water Act. 80 Fed. Reg. 37054 (Clean Water Rule).

Under § 1369(b)(1) of the Clean Water Act, certain actions of the Environmental Protection Agency are subject to exclusive review in the courts of appeals. In determining whether promulgation of the Clean Water Rule was such an action, the Sixth Circuit considered subsections (E) and (F) that involve:

> (E) approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) issuing or denying any permit under section 1342 of this title.

One judge on the Sixth Circuit panel concluded the Rule satisfied both subsections (E) and (F) of the jurisdictional standard. One judge concluded the Rule only satisfied subsection (F). And one judge concluded neither subsection was satisfied and § 1369(b)(1) did not apply.

Question: Does a rule defining federal jurisdiction under the Clean Water Act, but which does not entail issuing or denying a permit, vest the courts of appeals with exclusive power to review the rule under § 1369(b)(1)(F)?

LIST OF ALL PARTIES

The Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the Sixth Circuit (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)), the Sixth Circuit then permitted petitioner here, the National Association of Manufacturers, to intervene as a respondent. Order, No. 15-3751 cons. (Sept. 16, 2015).

The federal agency respondents are the U.S. Environmental Protection Agency; Regina McCarthy, in her official capacity as EPA administrator; the U.S. Army Corps of Engineers; Lieutenant General Todd T. Semonite, in his official capacity as the Corps' Chief of Engineers and Commanding General; Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army; and Eric Fanning, in his official capacity as Secretary of the Army.

State respondents and intervenor-respondents are the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

Over 100 other parties filed 22 petitions for review below, and intervened in other petitions, and many of those petitioners moved to dismiss their own and other petitions for review for want of jurisdiction. These petitioners below, respondents here, are as follows:

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, and New Mexico State Engineer.

No. 15-3837: Waterkeeper Alliance; Center for Biological Diversity; Center for Food Safety; Humboldt Baykeeper; Russian Riverkeeper; Monterey Coastkeeper; Upper Missouri Waterkeeper, Inc.; Snake River Waterkeeper, Inc.; Turtle Island Restoration Network, Inc.

No. 15-3839: Puget SoundKeeper; Sierra Club.

No. 15-3850: American FarmBureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.; AGrowStar, LLC; and R.W. Griffin Feed, Seed & Fertilizer, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, and Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc.; and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

CORPORATE DISCLOSURE STATEMENT

Respondents are non-profit advocacy groups or privately held companies that have no parent corporations and do not issue stock.

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OPINIONS BELOW

The decision of the court of appeals is reported at 817 F.3d 261 (6th Cir. 2016) (*See* Pet. App. 1a-47a). The court of appeals' denial of the petition for rehearing en banc was not reported and is reproduced at Pet. App. 51a-52a.

JURISDICTION

The separate judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of subject matter jurisdiction was entered on February 22, 2016. Pet. App. 48a-50a. The court of appeals' order denying rehearing en banc was entered April 21, 2016. On July 21, 2016, Justice Kagan extended the time to file the Petition to September 2, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Although the parties filing this brief are aligned with the petitioner in the court below, they appear in this case as respondents. *See* Petition for Certiorari at iv and v (Nos. 15-3885, 15-4188, and 15-4305). Respondents support the Petition for Certiorari.

The Petition raises a question of great national importance about whether Congress intended a definitional rule delineating the scope of the Clean Water Act (Act) to be reviewed exclusively in the court of appeals, or, as the plain text of the Act states, in the federal district courts. This is important because cases challenging the Clean Water Rule (Rule) are pending in numerous district courts and in the Sixth and the Tenth Circuit Courts of Appeals and the Rule itself extends federal regulatory authority over local land and water use further than any rule in this nation's history. It affects millions of landowners across the country.

Review of the Sixth Circuit's decision on jurisdiction is warranted for four reasons. First, if this Court does not review the decision now, it may never do so, leaving the issue unresolved. Second, delay in reviewing the decision may result in substantial and unnecessary cost and delay. Third, the decision below is inconsistent with this Court's treatment of subject matter jurisdiction under 33 U.S.C. § 1369(b)(1). And fourth, resolution of this issue is needed to effectuate the clear intent of Congress.

ARGUMENT

I

THIS COURT SHOULD GRANT REVIEW BECAUSE IT MAY BE THE ONLY TIME IN THIS CASE THE COURT IS PRESENTED WITH THE JURISDICTIONAL QUESTION

If this Court does not grant interlocutory review of the Sixth Circuit jurisdictional determination, it is not only possible, but likely, this Court will not have the opportunity to resolve the issue in this case at a later time because a decision on the merits may never reach this Court.

The most likely outcome in the Sixth Circuit on the merits is a win for petitioners. This is evident from the Sixth Circuit's issuance of a preliminary injunction staying enforcement of the Clean Water Rule nationwide. *See In re EPA*, 803 F.3d 804 (6th Cir. 2015).

The Sixth Circuit concluded that "petitioners have demonstrated a substantial possibility of success on the merits of their claims." *Id.* at 807. The court was skeptical of the bright-line distance limitations associated with terms like "adjacent waters" and "significant nexus" adopted in the Clean Water Rule. *Id.* The court determined the distance limitations for defining jurisdictional waters, such as those within 4,000 feet of a "tributary," were likely inconsistent with this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), even under Justice Kennedy's interpretation of the Act. *In re EPA*, 803 F.3d at 807. The court also found "the rulemaking process by which the distance limitations were adopted is facially suspect." *Id.* This followed from the fact that the

distance limitations included in the final Rule did not appear in the proposed Rule and were not a "logical outgrowth" thereof, as required to satisfy the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553. *In re EPA*, 803 F.3d at 807-08.

> Although the record compiled by respondent agencies is extensive, respondents have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the rule were among the range of alternatives being considered.

Id. at 807.

"Nor have respondents cited specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose." *Id.*

The Sixth Circuit was also concerned about the "sheer breadth of the ripple effects caused by the Rule's definitional changes" on the nation as a whole. *Id.* at 808.

> What is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters.

Id.

The Sixth Circuit is right to be concerned. The Clean Water Rule categorically extends federal

jurisdiction to all tributaries of a traditional navigable water, no matter how small, remote, indirect, or intermittent. 80 Fed. Reg. 37054, 37074 (June 29, 2015). This impinges on state power, exceeds the limits of constitutional authority, and directly conflicts with *Rapanos* in which this Court rejected categorical regulation of all tributaries. The inclusion of certain waters within 4,000 feet of any tributary or within the 100 year floodplain, *id.*, also conflicts with this Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), (*SWANCC*), that expressly prohibited federal regulation of "isolated waterbodies." The Clean Water Rule federalizes virtually all waters in the United States and much of the land.

This concern extends beyond the Sixth Circuit to the District of North Dakota that stayed the Rule as applied to 13 states: North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico. *See North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). The Sixth Circuit made note of this stay in its own ruling. *See In re EPA*, 803 F.3d at 808 n4.

Among other things, the District Court of North Dakota concluded the Clean Water Rule's definition of covered tributaries is inconsistent with the *Rapanos* decision and the "States have established a fair chance of success on the merits of their claim that the Rule violates the congressional grant of authority to the EPA." *North Dakota*, 127 F. Supp. 3d at 1056. The court also found the Rule likely invalid because the inclusion of all tributaries and the distance limitation of 4,000 feet appears "arbitrary and capricious." *Id.* at

1057. And, like the Sixth Circuit, the North Dakota court concluded the final rule potentially violated the APA because it was substantively different from the proposed rule:

> When the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule.

Id. at 1058.

If the state, industry, and municipal petitioners are successful in challenging the Clean Water Rule in the Sixth Circuit, as appears likely from these preliminary injunctions, it would be strange for petitioners to seek review of that favorable decision in this Court, even to resolve the jurisdictional question presented here. In fact, it would be contrary to their interest to do so. The government also has good reason to not petition this Court for review if it loses the case below because: (1) the Rule undoubtedly violates the APA and conflicts with this Court's opinions in *Rapanos* and *SWANCC*; (2) the government supports jurisdiction in the courts of appeals and opposes review of the jurisdictional question here; and (3) it is possible the new administration may wish to recall or revise the Rule without seeking review in this Court, which would start another round of uncertain litigation.

This uncertainty warrants immediate review of the interlocutory petition. The question presented is of great national importance as it goes to the intent of Congress with respect to one of the broadest and most

intrusive statutes in the history of the nation. The challenged Clean Water Rule affects tens of millions of public and private landowners across the Country who remain in the dark about where to bring a facial challenge to federal rules defining the scope of the Clean Water Act. Moreover, as the Petition demonstrates, there is a conflict among the lower courts as to how to interpret § 1369(b)(1) of the Act. *See* Petition at 20-24. This situation is as unnecessary as it is intolerable. This Court should grant the Petition and resolve the jurisdictional question sooner rather than later.

II

THIS COURT SHOULD GRANT REVIEW BECAUSE IMMEDIATE RESOLUTION OF THE JURISDICTIONAL QUESTION IS THE BEST USE OF PARTY AND COURT RESOURCES

If this Court waits to decide the jurisdictional question until after the Sixth Circuit rules on the merits of the challenge, the result could be "a perfect storm." A decision by this Court that the Sixth Circuit did not have subject matter jurisdiction under § 1369(b)(1) of the Clean Water Act would require a complete redo with relitigation at the district court level. All the cost and delay to that point would be for naught. This is bad public policy and a waste of resources for all concerned that benefits no one. But, more to the point, this possibility of unnecessary cost and delay is avoided if this Court addresses the question now.

Soon after the Clean Water Rule was issued, the Rule was challenged in nearly a dozen suits filed across the country in nine district courts. These challenges included a majority of the states and scores of municipal and industry parties. The challenges were brought in district court because a plain reading of 33 U.S.C. § 1369(b)(1) required it. The Clean Water Act is unequivocal: a challenge to agency action is authorized directly in a court of appeals only when the agency action involves "approving or promulgating any effluent limitation or other limitation" or "the issuing or denying of a permit." § 1369(b)(1)(E) & (F). The Clean Water Rule involves no such action. It is a definitional rulemaking only, establishing the limits of federal authority under the Clean Water Act. It defines the scope of the Act without regard for any limitation or permit.

As a protective measure only, the parties that originally filed suits in the district courts, including respondents here, petitioned for review in their respective courts of appeals. These were consolidated in the Sixth Circuit, which determined it had exclusive subject matter jurisdiction under § 1369(b)(1) to review these challenges. However, a ruling by this Court that the Sixth Circuit misread § 1369(b)(1) is highly likely.

Each of the three judges on the Sixth Circuit panel acknowledged that a plain reading of the Act does not support review of the Clean Water Rule in the court of appeals. *See In re Department of Defense*, 817 F.3d 261 (6th Cir. 2016). In the lead opinion, Judge McKeague concluded the Clean Water Rule fell under § 1369(b)(1)(E) and (F) of the Act, giving exclusive jurisdiction to the courts of appeals. *Id.* at 263-64. However, that was not based on a textual reading of

the statutory language, but on what the judge called a "practical, functional" reading of the Act. *Id.* at 273. Contrary to Judge McKeague, Judge Griffin eschewed a "functional" reading of the Act preferring a more "textualist" approach. According to Judge Griffin, "it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues. Nevertheless, because [*National Cotton Council of America v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009)] held otherwise with respect to subsection (F)," he concurred in the judgment only. *Id.* at 275. Finally, Judge Keith concluded in his dissent that "under a plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C. § 1369(b)(1) confers original jurisdiction on the appellate courts" and that *National Cotton* was inapposite. *Id.* at 283. Therefore, Judge Keith would have found jurisdiction in the district courts. This fractured ruling suggests the issue of jurisdiction is uncertain even in the Sixth Circuit and warrants review and reversal by this Court.

In deference to the Sixth Circuit's uncertain and doubtful ruling on jurisdiction, proceedings challenging the Clean Water Rule were dismissed in the Northern District of W. Virginia (1:15-cv-110), the Southern District of Ohio (2:15-cv-2467), and the Northern District of Oklahoma (4:15-cv-381). Proceedings are stayed, pending further development on the jurisdictional issue in the courts of appeals or in this Court, in the District of North Dakota (3:15-cv-59), the Southern District of Georgia (2:15-cv-79), the Northern District of Georgia (1:15-cv-2488), and the D.C. District Court (1:16-cv-01279). Motions to dismiss are pending in the Southern District of Texas (3:15-cv-162 and 3:15-cv-165) and the District of Minnesota

(0:15-cv-3058). Of the eleven suits brought in district court, seven still await a final determination on jurisdiction; a determination only this Court can give.

That the Sixth Circuit did not and could not provide a consistent interpretation of § 1369(b)(1), and that the majority of the district courts are still awaiting conclusive direction from this Court, demonstrate the need for immediate review of this Petition.

It is also noteworthy that the Tenth Circuit has scheduled a hearing on the jurisdictional question for mid-November (lead case No. 16-5038), and briefs on the merits in the Sixth Circuit have not yet been filed. Merits briefing will take months; it certainly will not be completed before next year. If this Court grants the Petition, the Sixth Circuit would likely hold any briefing in abeyance until this Court resolves the jurisdictional question. This would be the best possible outcome to avoid unnecessary delay and cost. And, if this Court decides, as it should, that subject matter jurisdiction lies within the district courts, the district courts are already poised to proceed.

III

THIS COURT SHOULD GRANT REVIEW BECAUSE THE JURISDICTIONAL DECISION BELOW IS INCONSISTENT WITH THIS COURT'S TREATMENT OF § 1369(b)(1)

This Court's treatment of § 1369(b)(1)(E) and (F) in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), conflicts with the Sixth Circuit's interpretation.

In *E.I. du Pont*, the EPA issued general effluent limitations for certain categories of point source discharges. Because these effluent limitations were issued by rule rather than on a permit-by-permit basis, the petitioners argued the rule was subject to challenge in the district court rather than in the court of appeals. However, this Court held the EPA was authorized to promulgate effluent limitations by rule, as well as on a case-by-case basis. This Court concluded, therefore, that review in the court of appeals was compelled by § 1369(b)(1)(E) as an agency action "approving or promulgating any effluent limitation."

Judge McKeague relied on this case below for the notion that this Court advocates a "practical interpretation" of § 1369(b)(1) rather than a "textual" or "plain reading" of the Act. But this Court did not need to apply a "practical interpretation" of the Act in that case contrary to the obvious meaning of the Act, as the Sixth Circuit did in this case. The issuance of a rule specifying effluent limitations for various categories of point source discharges falls squarely within the plain meaning of the statute. A rule that sets generally-applicable effluent standards is, by definition, a promulgation of an effluent limitation under subsection (E). This is quite different from the Clean Water Rule which defines the scope of the Act and nothing more.

This Court's analysis of § 1369(b)(1) in *Crown Simpson* was similar. In *Crown Simpson*, the EPA denied a variance and disapproved effluent limitations that were included in a specific permit issued by the State of California to certain pulp-mills that discharged into the Pacific Ocean near Eureka, California. The Ninth Circuit held it did not have jurisdiction to review

the EPA action because it did not involve a direct permit denial under § 1369(b)(1)(F). This Court disagreed: "When EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to deny a permit within the meaning of [§ 1369(b)(1)(F)]" as an agency action that involves "issuing or denying any permit." *Crown Simpson*, 445 U.S. at 196.

As in *E.I. du Pont*, this Court did not discuss the need for a "practical interpretation" of the Act divorced from the plain meaning of the statutory terms. To the contrary, this Court applied the plain meaning of subsection (F) to the case in a per curiam decision without compromising the statutory text. Neither *E.I. du Pont* nor *Crown Simpson* counsel a rewriting of § 1369(b)(1). The Sixth Circuit was wrong to do so in this case.

The Clean Water Rule does not address any relevant limitations or issue or deny a permit, in a literal or even a practical sense. It identifies jurisdictional waters, not compliance standards. That the jurisdictional boundaries identified in the Rule may be relied on ultimately to determine effluent guidelines or the issuance or denial of a permit does not change the nature of the Rule itself, which is limited to defining "waters of the United States" subject to review in the district courts. This Court should grant the petition.

IV

THIS COURT SHOULD GRANT REVIEW TO EFFECTUATE THE INTENT OF CONGRESS

Assuming Congress acted within its constitutional authority, it is black letter law that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is law and must be given effect." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,843 n.9 (1984). It is also black letter law that the intention of Congress is best ascertained from the language Congress used to express its intent. "If the intent of Congress is clear, that is the end of the matter . . . ." *Id.* at 842.

The intent of Congress in § 1369(b)(1) is clear, even if the Sixth Circuit refused to follow it. Subsection 1369(b)(1) of the Clean Water Act could not be more clear: Actions of the Environmental Protection Agency are subject to exclusive review in the courts of appeals only when "approving or promulgating any effluent limitation or other limitation" and when "issuing or denying any permit." However one may wish to interpret that language, it cannot be said to cover *all* agency actions. But that is the result if § 1369(b)(1) applies to the Clean Water Rule.

> If this court construes [§ 1369(b)(1)] to be so broad as to cover the facts of this case, that construction brings subsection (F) to its breaking point: a foreseeable consequence of the concurrence's reasoning is that this court would exercise original subject-matter

> jurisdiction over all things related to the Clean Water Act.

In re Department of Defense, 817 F.3d at 284 (Keith, J., dissenting).

That is the result if the Sixth Circuit jurisdictional ruling is allowed to stand. It is not the result Congress intended. To the contrary, the language of § 1369(b)(1) necessarily excludes agency actions that do not involve an effluent limitation (or other limitation) or a permit decision.

The Clean Water Rule does not purport to set any relevant limitation or issue or deny a permit, either general or individual. The government does not and cannot point to any language in the Rule to the contrary. The Rule is confined to defining so-called jurisdictional waters or "waters of the United States," subject to federal regulation. Even a formal, site-specific Jurisdictional Determination, based on the Rule's definition of "waters of the United States," does not constitute the issuance or denial of a permit. Recently, in *U.S. Army Corps of Engineers v. Hawkes Co.*, __ U.S. __, 136 S. Ct. 1807 (2016), this Court authorized judicial review of formal Jurisdictional Determinations directly in the district court, even remanding the case for trial court resolution. If a site-specific Jurisdictional Determination does not invoke § 1369(b)(1), it is hard to fathom how the more general Clean Water Rule could do so.

Agency actions authorized for direct review in a court of appeals under § 1369(b)(1) generally involve discrete, site-specific determinations. To alleviate the burdens of such decisionmaking, Congress sensibly authorized immediate review of targeted agency

actions in the court of appeals. According to District Judge Renfrew, sitting by designation, and cited by this Court in *Crown Simpson*, § 1369(b)(1) signaled a "congressional goal of ensuring prompt resolution of EPA's actions." 445 U.S. at 196. But congress did not express an intent to resolve all agency actions related to the Clean Water Act in the court of appeals. Otherwise it would have said so. *See Harrison v. PPG Industries Inc.*, 446 U.S. 578, 579 (1980) (citing Section 307(b)(1) of the Clean Air Act that provides for direct review in a court of appeals for any "final action" of the EPA under the act.).

Where the agency action does not generally involve a discrete, site-specific determination, Congress left judicial review to the district courts. That approach benefits all parties and the court when the agency action involves a definitional rule of nationwide application, like the Clean Water Rule. In this case, and cases like it, the courts of appeals benefit greatly from a broad spectrum of district court opinions, especially those opinions that address the regional differences of the Rule's application.

The courts' understanding of these differences can affect the ultimate resolution of the agency action. For example, an "ephemeral stream" in the east may flow often with copious amounts of water such that it has a measurable effect on a nearby navigable water; whereas, an "ephemeral stream" in the arid west may be no more than a barely discernible desert channel that only flows once every decade, or more rarely, and has no observable effect on a downstream navigable water hundreds of miles away. Federal regulation of the former may be reasonable, but regulation of the latter would be arbitrary and capricious. And yet, both

are deemed categorical "waters of the United States" under the Clean Water Rule. *See* 80 Fed. Reg. at 37104-37106. Multiple challenges to the Rule in district courts throughout the country are necessary and have been initiated to vet the Rule.

The intent of Congress as expressed in § 1369(b)(1) is clear. It does not cover the Clean Water Rule. This Court should grant the Petition to effectuate congressional intent and allow the currently stalled district court cases to proceed.

CONCLUSION

The Sixth Circuit decision raises an important question of law that requires resolution by this Court. Delay in resolving the question is unnecessary and counterproductive. This Court should grant the Petition to determine subject matter jurisdiction under § 1369(b)(1) of the Clean Water Act.

DATED: October, 2016.

Respectfully submitted,

STEVEN J. LECHNER
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
lechner@mountainstateslegal.com

Counsel for Respondent, American Exploration & Mining Association

M. REED HOPPER
Counsel of Record
ANTHONY L. FRANÇOIS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
MRH@pacificlegal.org
ALF@pacificlegal.org

Counsel for Respondents, Washington Cattlemen's Association; et al.

RICHARD A. HORDER
JENNIFER A. SIMON
Kazmarek Mowrey Cloud
Laseter LLP
1230 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30309
Telephone: (404) 812-0126
rhorder@kmcllaw.com
jsimon@kmcllaw.com

KIMBERLY S. HERMANN
Southeastern Legal
Foundation, Inc.
2255 Sewell Mill Road
Suite 320
Marietta, Georgia 30062
Telephone: (770) 977-2131
khermann@southeasternlegal.org

Counsel for Respondents,
Southeastern Legal Foundation,
Inc.; et al.

RECORD AND BRIEFS

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No. 16-299

In the
Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN SUPPORT OF PETITIONER ON BEHALF OF AGROWSTAR, LLC; AMERICAN EXPLORATION & MINING ASSOCIATION; CALIFORNIA CATTLEMEN'S ASSOCIATION; COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH; DUARTE NURSERY, INC.; GEORGIA AGRIBUSINESS COUNCIL, INC.; GREATER ATLANTA HOMEBUILDERS ASSOCIATION, INC.; HAWKES COMPANY, INC., LPF PROPERTIES, LLC; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO FEDERAL LANDS COUNCIL; NEW MEXICO WOOL GROWERS, INC.; OREGON CATTLEMEN'S ASSOCIATION; PIERCE INVESTMENT COMPANY; R. W. GRIFFIN FEED, SEED & FERTILIZER, INC.; SOUTHEASTERN LEGAL FOUNDATION, INC., AND WASHINGTON CATTLEMEN'S ASSOCIATION

STEVEN J. LECHNER
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
lechner@mountainstateslegal.com

M. REED HOPPER
Counsel of record
ANTHONY L. FRANÇOIS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
MRH@pacificlegal.org

Counsel for Respondents
Additional Counsel Listed on Inside Cover

RICHARD A. HORDER
JENNIFER A. SIMON
Kazmarek Mowrey Cloud
Laseter LLP
1230 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30309
Telephone: (404) 812-0126
rhorder@kmcllaw.com
jsimon@kmcllaw.com

KIMBERLY S. HERMANN
Southeastern Legal
Foundation
2255 Sewell Mill Road
Suite 320
Marietta, Georgia 30062
Telephone: (770) 977-2131
khermann@
southeasternlegal.org

QUESTION PRESENTED

Is the federal rule redefining "waters of the United States" under the Clean Water Act subject to exclusive review in the circuit courts of appeals under 33 U.S.C. § 1369(b)(1)?

CORPORATE DISCLOSURE STATEMENT

Respondents are non-profit advocacy groups or privately held companies that have no parent corporations and do not issue stock.

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SUMMARY OF THE ARGUMENT

The government rejects the plain meaning of § 1369(b)(1)(E) and (F) of the Clean Water Act that confer exclusive appellate jurisdiction solely on agency actions "approving or promulgating" any effluent or other limitation or "issuing or denying" any permit. The Rule defining "waters of the United States" expressly declares it has no such effect and only delineates the general scope of the Act. The government asks this Court to ignore its own statements about the Rule and interpret the text of § 1369(b)(1) expansively, relying on "practical considerations," such as judicial efficiency, to bring the Rule under appellate court review. But this approach contravenes Supreme Court precedent and the explicit language of the Act.

When interpreting a statute, this Court relies on the plain meaning of the statutory text, unless that interpretation is absurd. Restricting judicial review of some agency actions to the appellate courts while allowing other agency actions to be heard in the district courts is perfectly reasonable where Congress has expressly allocated federal court jurisdiction. But rewriting the Act, as the government urges, to cover agency actions that are clearly excluded by the plain text, undermines the intent of Congress and the "rule of law," and conflicts with this Court's treatment of § 1369(b)(1) in other cases. In each case where this Court has applied § 1369(b)(1), it relied on the Act's plain meaning. It should do so here and hold the Rule clearly falls outside § 1369(b)(1) and must be challenged in the federal district courts.

ARGUMENT

On June 29, 2015, the Environmental Protection Agency and U.S. Army Corps of Engineers promulgated a revised rule defining "waters of the United States" subject to the Clean Water Act. 80 Fed. Reg. 37054 (WOTUS Rule). The WOTUS Rule covers:

> 1. All waters which are or were or may be used in interstate or foreign commerce;
>
> 2. All interstate waters;
>
> 3. The territorial seas;
>
> 4. All impoundments of any "waters of the United States;"
>
> 5. All tributaries to waters 1-3. A "tributary" means a water that contributes flow directly or through another water (including any impoundment), to waters 1-3, that has physical indicators of a bed and bank and an ordinary high water mark. A tributary may be natural or man-made.
>
> 6. All waters adjacent to waters 1-5. "Adjacent" means bordering, contiguous, or neighboring. "Neighboring" means within 100 feet of the ordinary high water mark of waters 1-5. And, all waters within the 100-year floodplain of waters 1-5 and not more than 1,500 feet from the ordinary high water

> mark. Also, all waters within 1,500 feet of the high tide line of waters 1-3.
>
> 7. All of the following waters that have been determined on a case-by-case basis to have a significant nexus to waters 1-3: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands. "Significant nexus" means that a water, alone or in combination with similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of waters 1-3. "Significant" means more than speculative or insubstantial and includes effects on any one of nine factors.
>
> 8. And, all waters located within the 100-year floodplain of waters 1-3 and all waters within 4,000 feet of the high tide line or ordinary high water mark of waters 1-5 when they have a significant nexus to waters 1-3.

Some waters are excluded from federal regulation under the Final Rule. *Id.* at 37104-37106

The ultimate question for this Court is whether the WOTUS Rule is tantamount to:

> (E) approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of [the Act], [or]

> (F) issuing or denying any permit under section 1342 of [the Act].

33 U.S.C. § 1369(b)(1)(E) and (F).[1]

That question turns on two other questions: (1) what is the plain meaning of § 1369(b)(1)(E) and (F); and (2) did this Court authorize a departure from the plain meaning of that provision in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980).

I

THE PLAIN LANGUAGE OF § 1369(b)(1) CONTROLS

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States. v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Where the words are clear, they are controlling. *See Lamie v.*

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[1] It is undisputed that this provision only applies to effluent discharges regulated under Section 402 (33 U.S.C. § 1342) of the Act known as the National Pollutant Discharge Elimination System (or NPDES) program administered by the EPA and does not apply to "dredged and fill" discharges regulated under Section 404 (33 U.S.C. § 1344) of the Act and administered by the Army Corps of Engineers.

U.S. Tr., 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here.

In support of the petition, the States and Petitioner provided a detailed analysis of § 1369(b)(1) which we join. That analysis demonstrates that, on its face, 33 U.S.C § 1369(b)(1)(E) and (F) do not apply to the WOTUS Rule because the Rule only defines jurisdictional waters under the Act and does not purport to approve or promulgate any limitation or issue or deny any permit. The Rule itself states it "does not establish any regulatory requirements," 80 Fed. Reg. at 37054, and "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments," *id.* at 37102.

But the same cannot be said for agency actions "approving or promulgating any effluent limitation or other limitation" or "issuing or denying [a] permit." 33 U.S.C. § 1369(b)(1)(E) and (F). Such actions involve particularized enforcement of the Act as applied to specific entities and operations. They are several steps removed and quite different in nature, scope, impact, and time from identifying the reach of the Act under the WOTUS Rule. Therefore, under a plain reading of

the Act, § 1369(b)(1) does not apply to the Rule. This Court relies on the plain meaning of a statute unless it would lead to an absurd result:

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)).

Lamie, 540 U.S. at 534.

Relying on the plain meaning of § 1369(b)(1)(E) and (F) of the Clean Water Act is far from absurd. Rather, it restricts judicial review of certain NPDES (§ 402) effluent or permit actions of the EPA to the exclusive jurisdiction of the courts of appeals while allowing legal challenges to all other actions—such as defining the general scope of the Act—to proceed in the district courts. This is consistent with the general practice of our judicial system to initiate most legal challenges in the district courts.

Section 1369(b)(1) identifies only seven specific agency actions of the EPA Administrator which are subject to immediate review in the appellate courts:

> (1) Review of the Administrator's action
>
> (A) in promulgating any standard of performance under section 1316 of this title,
>
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
>
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title, and
>
> (G) in promulgating any individual control strategy under section 1314(*l*) of this title,

33 U.S.C. § 1369(b)(1).

Unlike the catch-all provision in the Clean Air Act, § 1369(b)(1) is limited to these enumerated actions. *See Harrison v. PPG Indus. Inc.*, 446 U.S. 578, 579 (1980) (citing Section 307(b)(1) of the Clean Air Act that provides for direct review in a court of appeals for any "final action" of EPA under the Act). By singling out these seven actions of EPA for direct review in the courts of appeals, Congress expressed its intent through the clear text to exclude those actions not enumerated. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (*Expressio unius est exclusio alterius* — listed items exclude non-listed items). For those actions not covered by § 1369(b)(1), the Administrative Procedure Act (APA) authorizes judicial review in the trial courts. Sections 702 and 704 of the APA provide that "[a] person suffering legal wrong" or "adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Among the many actions not restricted to review in a court of appeals under § 1369(b)(1) are all agency actions of the Army Corps of Engineers under § 404 of the Act which must be brought in a district court under the APA. If review of agency actions in the district courts under the APA generally, and under § 404 of the Clean Water Act specifically, is not absurd, neither is limiting EPA review in the courts of appeals to some, but not all, EPA actions. A plain reading of § 1369(b)(1)(E) and (F) is perfectly reasonable and this Court should enforce it according to its terms.

Contrary to the clear text of that provision, the government argues § 1369(b)(1)(F) should be read (or

more accurately, rewritten) to apply to any agency action that "affects" a permit, no matter how indirect or attenuated. *See* Government Opposition to the Petition at 11. This expansive interpretation calls for excising the words "issuing or denying" and inserting the word "affecting," thereby altering the language, intent, and meaning of the Act. But this Court rejected such an approach to statutory interpretation in *Lamie v. U.S. Trustee*, 540 U.S. 526.

In that case, a debtor's attorney sought fees for work provided in a Chapter 7 bankruptcy proceeding. *Id.* at 526. Prior to 1994, the bankruptcy code authorized payment of fees "to a trustee, to an examiner, to a professional person [employed by the trustee and authorized by the court] . . . or to the debtor's attorney." *Id.* Under a plain reading of the code, an attorney who did work on behalf of a debtor could receive an award of fees even if not employed by the trustee and approved by the court. Congress altered the code in 1994 to authorize fees for trustees, examiners, professional persons, and attorneys, employed by the trustee and approved by the court, thus excluding debtor's attorneys from the text. *Id.* Petitioner admitted he was not employed by the trustee nor approved by the court but argued the revised code should be read like the original to authorize an award of fees to a debtor's attorney. *Id.* This Court rejected that argument and held the plain meaning of the revised code was not absurd and was therefore controlling.

The Court reasoned that the petitioner's interpretation would violate a canon of statutory construction—"reading absent word[s] into the

statute." *Lamie*, 540 U.S. at 538. "That is, his argument would result 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.'" *Id.* (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)). This Court concluded, "With a plain, *nonabsurd* meaning in view, we need not proceed in this way." *Id.* (emphasis added); *see Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

Congress affirmatively and specifically enacted the text of § 1369(b)(1). Its omission of the words "affecting any permit" in subsection (F) is not absurd nor the result of inadvertence or mistake. The text of the Act is clear and intentional. Its plain language applies only to issuing or denying a permit. In deference to congressional intent as expressed in § 1369(b)(1), this Court should not enlarge the scope of the Act by rewriting it.

> Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *United States v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (citing *Richards v.*

United States, 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962)).

Lamie, 540 U.S. at 538.

II

THIS COURT CONSISTENTLY RELIES ON § 1369(b)(1)'S PLAIN LANGUAGE

This Court applied § 1369(b)(1) in two cases: *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. at 136, and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-97. In both cases, this Court relied on the provision's plain text. This Court should do so here.

a) E.I. du Pont

Section 1369(b)(1)(E) of the Clean Water Act authorizes exclusive judicial review in a court of appeals of EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" of the Act. In *E.I. du Pont*, EPA *promulgated* industrywide regulations under the Act setting *effluent limitations* on both new and existing chemical manufacturers. 430 U.S. at 115. The petitioning manufacturers argued review was proper in the court of appeals only when EPA issued individual permits rather than industrywide regulations, but this Court disagreed. By application of the Act's plain meaning, this Court held: "We regard [§ 1369(b)(1)(E)] as unambiguously authorizing court of appeals review of EPA action promulgating an effluent limitation" that applies industrywide. *Id.* at 136. This Court did not engage in a textual analysis of

this provision or call on any interpretative canon to reach this conclusion. This Court found the language clear and the conclusion unavoidable—the promulgation of effluent limitations under the Act is a promulgation of an effluent limitation under § 1369(b)(1)(E). Once the Court determined the regulation was an effluent limitation under Section 301 and not (as the petitioners argued) a guideline under Section 304, the text of the Act resolved the jurisdictional question. The plain meaning of the Act compelled appellate review of such an action.

The government tries to introduce some ambiguity into the decision by citing this Court's statement, relied on by Judge McKeague below, that the manufacturers' "construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 [NPDES] but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont*, 430 U.S. at 136.

The government argues the WOTUS Rule is a basic regulation governing individual § 402 permits such that it must be covered by § 1369(b)(1)(E), like the industrywide regulations in *E.I. du Pont*. *See* Government Opposition to Petition at 11-12. But the government overlooks the obvious. The regulations in *E.I. du Pont* established actual effluent limitations, as defined in § 1369(b)(1)(E), while the WOTUS Rule does not. *See E.I. du Pont*, 430 U.S. at 115 ("The Environmental Protection Agency has promulgated industrywide regulations imposing three sets of precise limitations on petitioners' discharges.")

(footnote omitted). The WOTUS Rule is solely definitional and sets no effluent limitation whatsoever. EPA did not promulgate the Rule under any of the § 1369(b)(1)(E) sections but under EPA's general Section 501(a) CWA rulemaking authority. *See* 33 U.S.C. § 1361(a). Under a plain meaning of the Act, § 1369(b)(1)(E) does not apply to the WOTUS Rule and *E.I. du Pont* supports that conclusion.

b) Crown Simpson

The government argues *Crown Simpson* endorses a pragmatic approach to statutory interpretation and that the case supports its claim that § 1369(b)(1) places jurisdiction over the WOTUS Rule litigation in the courts of appeals. The government misinterprets this Court's holding. This Court relied on the plain meaning of § 1369(b)(1) which excludes the Rule from direct appellate review.

EPA administers the Clean Water Act's § 402 or NPDES permit program for regulating industrial discharges to covered waters. The Act does allow the States to administer this program, but EPA retains the power to veto any permit the States issue. In *Crown Simpson*, California issued NPDES permits to certain pulp mills that discharge effluent into coastal waters. 445 U.S. at 194. EPA sought stricter effluent controls and "vetoed the permits." *Id.* at 195. On direct petition to the Ninth Circuit, the court held § 1369(b)(1)(E) and (F) do not apply and dismissed the case for lack of subject matter jurisdiction. *Id.*

The Ninth Circuit reasoned it had no jurisdiction to hear the case under subsection (E) because EPA's permit veto did not involve "approving or promulgating any effluent limitation or other limitation." *Crown Simpson*, 445 U.S. at 195. Judge Renfrew wrote a concurring opinion in which he agreed with the majority that § 1369(b)(1)(E) did not apply and the Ninth Circuit had no authority to review the EPA action. *Id.* at 196.

The Ninth Circuit also reasoned it had no jurisdiction to hear the case under subsection (F) because EPA's permit veto was not the same as "issuing or denying a permit." *Id.* In his concurrence, Judge Renfrew opined that the better analysis would find the EPA veto is "functionally similar" to a permit denial and that § 1369(b)(1)(F) does apply. *Id.*

This Court held: "We agree with the concurring opinion and hold the Court of Appeals had jurisdiction of this action under [§ 1369(b)(1)(F)]. When EPA, as here, objects to the effluent limitations contained in a state-issued permit, the precise effect of its action is to 'deny' a permit within the meaning of [§ 1369(b)(1)(F)]." *Id.*

It is instructive that this Court did not overturn the Ninth Circuit under § 1369(b)(1)(E). Although the permit expressly approved specific effluent limitations with which EPA disagreed, this Court did not find this a sufficiently compelling reason to even warrant a discussion of § 1369(b)(1)(E). *See id.* at 196n.7.. If this Court would not find that a permit veto directed at censoring the State's effluent limitations obviously falls within the scope of § 1369(b)(1)(E), it

would be bizarre if this Court were to find the WOTUS Rule, that involves neither a permit nor any effluent limitation, does fall within § 1369(b)(1)(E). *Crown Simpson* provides no support for the government's argument that subsection (E) applies to the Rule and that this case should be litigated in the courts of appeals.

Crown Simpson also provides no support for the government's argument that subsection (F) applies to the WOTUS Rule based on a "pragmatic approach" to interpreting that text. Nowhere in the opinion does this Court state, suggest, or imply that its interpretation of § 1369(b)(1)(F) was anything but a plain reading of the statutory language. This Court was emphatic—"the precise effect" of an EPA veto is a permit denial "within the meaning" of § 1369(b)(1)(F). *Id.* at 196. This Court applied the Act as written.

That this Court cited certain policy concerns to bolster its conclusion does not change the fact that this Court was giving effect to the plain meaning of the Act when it held a permit vetoed is a permit denied. Unlike the permit denial in *Crown Simpson*, the WOTUS Rule does not entail "issuing or denying a permit," either actually or functionally. Under *Crown Simpson* and a plain reading of § 1369(b)(1)(F), the Rule is not subject to exclusive jurisdiction in a court of appeals.

CONCLUSION

The intent of Congress as expressed in the text of § 1369(b)(1) is clear. It does not cover the WOTUS Rule. To effectuate the intent of Congress, this Court should vacate the Sixth Circuit decision and remand for further litigation in the district courts.

DATED: April, 2017

Respectfully submitted,

STEVEN J. LECHNER
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
lechner@mountainstateslegal.com
Counsel for Respondent American Exploration & Mining Association

M. REED HOPPER
Counsel of record
ANTHONY L. FRANÇOIS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
MRH@pacificlegal.org
Counsel for Respondents, Washington Cattlemen's Association, et al.

RICHARD A. HORDER
JENNIFER A. SIMON
Kazmarek Mowrey Cloud Laseter LLP
1230 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30309
Telephone: (404) 812-0126
rhorder@kmcllaw.com
jsimon@kmcllaw.com

KIMBERLY S. HERMANN
Southeastern Legal
Foundation
2255 Sewell Mill Road
Suite 320
Marietta, Georgia 30062
Telephone: (770) 977-2131
khermann@southeasternlegal.org
Counsel for Respondents,
Southeastern Legal Foundation,
Inc., et al.

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS AMERICAN FARM BUREAU FEDERATION *ET AL.* IN SUPPORT OF THE PETITION

ELLEN STEEN
Counsel of Record
DANIELLE HALLCOM QUIST
American Farm Bureau Federation
600 Maryland Ave. SW, Suite 1000W
Washington, DC 20024
(202) 406-3616
ellens@fb.org

(Additional Counsel Listed on Signature Page)

QUESTION PRESENTED

Whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.

RULE 29.6 STATEMENT

The respondents filing this brief are:

American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association (petitioners below in No. 15-3850).

Utility Water Act Group (petitioner below in No. 15-3858).

Florida Stormwater Association; and Southeast Stormwater Association (petitioners below in No. 15-4159).

CORPORATE DISCLOSURE STATEMENT

Respondents are not-for-profit advocacy groups. They have no parent corporations and do not issue publicly traded stock.

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BRIEF OF RESPONDENTS IN SUPPORT OF THE PETITION

Respondents represent a broad swathe of the national economy. Their members employ tens of millions of people, own or operate tens of millions of acres of land affected by the Waters of the United States ("WOTUS") Rule, and, using that land, provide food, fuel, housing, infrastructure, minerals, energy, and forest products for the entire U.S. population, and manage stormwater in the Southeastern States.[1]

These groups are respondents rather than petitioners here solely because uncertainty over which court has jurisdiction over their challenges to the WOTUS Rule forced them to file protective petitions for review in the court of appeals, in addition to the (still pending) complaints that many of them filed in district courts. Respondents fully agree with petitioner National Association of Manufacturers ("NAM") that this Court should grant certiorari to reverse the Sixth Circuit's jurisdictional decision and end once and for all the uncertainty that forced these multiple filings and produced the unhelpful and fractured three-opinion decision below.

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[1] Respondents here are the American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand and Gravel Association; Public Lands Council; Texas Farm Bureau; U.S. Poultry & Egg Association; Utility Water Act Group; Florida Stormwater Association; and Southeast Stormwater Association.

Respondents adopt in full petitioner NAM's arguments and do not repeat them here. Instead, respondents show why, from their perspective, this Court's immediate review is necessary.

STATEMENT

The petition presents a recurring question of significant importance concerning the proper forum for judicial review of Clean Water Act ("CWA" or "Act") regulations. As the petition explains, the Sixth Circuit erred in exercising jurisdiction under 33 U.S.C. § 1369(b) over challenges to the regulation that redefines the statutory phrase "waters of the United States." That error deepens a conflict among the circuits that perpetuates uncertainty and will continue to waste court and party resources. Petitioner also is correct that additional litigation in the lower courts will not refine the question presented by the petition.

Respondents are frequent litigants in CWA cases. Because the Act can impose substantial civil and criminal liability on industry, it is essential to respondents and their members that CWA regulations in fact comply with the CWA, the Administrative Procedure Act ("APA"), and other governing laws. Respondents have defended CWA regulations that have satisfied these standards and have challenged CWA regulations that have failed them.

The underlying regulation at issue here—the WOTUS Rule—is one of the most consequential CWA regulations ever promulgated. In the words of the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers (together, "the agencies"), it is "a national rule of unique importance, promulgated after a massive rulemaking process." Gov't Br. 63, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016). If affirmed by the courts and enforced

by the agencies, the WOTUS Rule would vastly expand the reach of the CWA in a manner that Congress never intended and that this Court's decisions prohibit. Respondents therefore were intent on challenging the Rule as soon as it was published in June of 2015.

Before respondents could file suit, however, they faced a threshold jurisdictional quandary that they have encountered before and will face again if this Court does not take this opportunity, *now*, to resolve the issue. Challenges to agency actions generally must be brought in the district courts under the APA. 5 U.S.C. § 703. The CWA, however, vests exclusive jurisdiction in the courts of appeals to review seven enumerated actions of the EPA Administrator, including actions "(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and] (F) in issuing or denying any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(1)(E)-(F). For reasons explained in the petition and below, respondents do not believe that the WOTUS Rule falls within Section 1369(b); they believe that jurisdiction over challenges to the WOTUS Rule instead lies in the district courts under the APA.

Many respondents here filed APA actions in the Southern District of Texas and Northern District of Florida challenging the WOTUS Rule, which remain pending. *Am. Farm Bureau Fed'n* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.); *Southeast Stormwater Ass'n* v. *EPA*, No. 4:15-cv-579 (N.D. Fla.). Scores of other litigants—including state, municipal, industry, and environmental plaintiffs—shared respondents' jurisdictional beliefs and filed more than a dozen other district court actions under the APA. See Pet. 8 n.1 (listing cases).

In light of the circuit conflict on the issue, and ambiguous language in the preamble to the WOTUS Rule, respondents and other plaintiffs feared that some courts might find that exclusive jurisdiction lay in the courts of appeals under Section 1369(b). As the agencies admitted when issuing the WOTUS Rule, "courts have reached different conclusions on the types of actions that fall within section [1369]." 80 Fed. Reg. 37054, 37104 (June 29, 2015). Importantly, if courts were to rule that exclusive jurisdiction lay in the courts of appeals under Section 1369(b), then petitions for review had to be filed in the courts of appeals within 120 days of the issuance of the final rule. See 33 U.S.C. § 1369(b)(1).

By late July 2015, at least twelve petitions for review had been filed in multiple courts of appeals. The Judicial Panel of Multidistrict Litigation ("JPML") randomly consolidated those petitions before the Sixth Circuit. See 28 U.S.C. § 2112(a)(3); Consolidation Order, MCP No. 135 (J.P.M.L. July 28, 2015). Thereafter, additional petitions for review were filed in the Sixth Circuit. Respondents here all filed protective petitions for review. Pets. for Review, No. 15-60509 (5th Cir. July 24, 2015) (UWAG); No. 15-3850 (6th Cir. Aug. 6, 2015) (AFBF *et al.*); No. 15-4159 (6th Cir. Oct. 26, 2015) (Southeast Stormwater Ass'n *et al.*).

The JPML's consolidation order aggravated respondents' jurisdictional concerns because the Sixth Circuit had previously given expansive scope to Section 1369(b) in *National Cotton Council* v. *EPA*, 553 F.3d 927 (6th Cir. 2009), the decision that the Eleventh Circuit criticized and rejected in *Friends of the Everglades* v. *EPA*, 699 F.3d 1280 (11th Cir. 2012). See Pet. 20-22.

The petitions to the appellate courts explained that respondents "believe that jurisdiction to review the [WOTUS] Rule lies properly and exclusively in the district courts" and that respondents filed the petitions "solely to preserve their rights." AFBF *et al.* Pet. for Review at 1-2; see also UWAG Pet. for Review at 3-4.

Petitioner NAM intervened as a respondent in the Sixth Circuit. Motion to Intervene, No. 15-3850 (6th Cir. Aug. 11, 2015). The American Farm Bureau Federation respondents, joined by petitioner, then jointly moved to dismiss the petitions for review for lack of jurisdiction. See Joint Motion to Dismiss, No. 15-3751 (6th Cir. Oct. 2, 2015). Many other petitioners in the Sixth Circuit likewise moved to dismiss their own and other petitions for lack of jurisdiction. See, *e.g.*, Intervenor UWAG Motion to Dismiss, No. 15-3751 (6th Cir. Oct. 2, 2015).

Respondents have spent the last year embroiled in litigation over this jurisdictional issue. Respondents have filed motions to dismiss, reply briefs, and a petition for rehearing in the Sixth Circuit. Some have filed amicus briefs in other courts of appeals seeking to overturn dismissals of district court complaints—including dismissals that relied on the Sixth Circuit's erroneous decision here. See Br. Amicus Curiae of Am. Farm Bureau Fed'n *et al.*, *Georgia* v. *McCarthy*, No. 15-14035 (11th Cir. Sept. 22, 2015); Br. Amicus Curiae of Am. Farm Bureau Fed'n *et al.*, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. July 8, 2016). Some respondents also have opposed agency motions to dismiss, for lack of jurisdiction, their APA lawsuits in the district courts. See Opp. to Motion to Dismiss, *Am. Farm Bureau Fed'n* v. *EPA*, No. 3:15-cv-165 (S.D. Tex. May 13, 2016); Order, *id.* (S.D. Tex. May 18, 2016) (taking motion under advisement).

Well more than a year has passed since respondents here filed district court actions and/or petitions for review. Yet neither we nor any other party has yet filed any brief in any court presenting the merits of the challenges to the WOTUS Rule.[2]

REASONS FOR GRANTING THE PETITION

I. The Petition Presents A Recurring Question That Causes Undue Delay And Wastes Judicial And Party Resources.

1. The courts of appeals are in disarray in their interpretations of Section 1369(b). There is an acknowledged conflict between the Sixth and Eleventh Circuits. See *Friends of the Everglades*, 699 F.3d at 1287-1288 (rejecting the Sixth Circuit's analysis in *National Cotton* and holding that the Eleventh Circuit lacked original jurisdiction to review EPA's water transfers rule); see also Allison LaPlante *et al.*, *On Judicial Review under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center: *What We Know Now and What We Have Yet to Find Out*, 43 Envtl. L. 767, 767 (2013) ("Circuits are split on the scope of the CWA's direct judicial review provision").

The law is also muddled within circuits. For example, "the Ninth Circuit is split both with other circuits, and within itself, on the issue of whether the courts of appeals have jurisdiction to review underlying

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[2] The Sixth Circuit suspended the schedule for merits briefing described in the petition until the court resolved pending motions to complete the administrative record. The Sixth Circuit has now issued a new briefing schedule under which opening briefs will be filed on November 1, 2016, and briefing will be complete on March 8, 2017. Case Mgt. Order No. 4 (6th Cir. Oct. 6, 2016).

NPDES regulations pursuant to section 509(b)(1)(F)." LaPlante *et al.*, *supra*, 43 Envtl. L. at 816.

The Sixth Circuit panel's 1-1-1 decision evidences the confusion. While recognizing that the WOTUS Rule does not fall within the text of Section 1369(b)(1)(F), Judge McKeague claimed that the Sixth Circuit nevertheless could exercise jurisdiction under case law including *National Cotton*, which he viewed as correctly decided. Pet. App. 17a-24a. Judge Griffin would have held that the court lacks jurisdiction under Section 1369(b)(1)(F), but he ruled that he was compelled to exercise jurisdiction under *National Cotton*, which he explained was incorrectly decided. *Id.* at 38a-45a. Judge Keith agreed with Judge Griffin that the Sixth Circuit lacked jurisdiction, but he would have found *National Cotton* distinguishable. *Id.* at 45a-47a.

Each judge's reading of the same statute and case law thus differed from the next. That result provides no guidance for future cases. And it provides no comfort in this case, because it raises the distinct possibility that, if the case now proceeds to a merits decision in the Sixth Circuit, millions of dollars and months of time could be expended by the parties and the court to no effect if the jurisdictional ruling is subsequently reversed en banc or by this Court.

Given the lack of clarity across and within circuits on the threshold issue of jurisdiction, the Seventh Circuit has identified the only sound strategy for litigants seeking to challenge a CWA regulation: "careful counsel must respond * * * by filing buckshot petitions" in both the district courts and courts of appeals. *Roll Coater, Inc.* v. *Reilly*, 932 F.2d 668, 671 (7th Cir. 1991). The federal agencies have agreed, recently telling the Tenth Circuit that "[g]iven uncertain jurisdiction [over challenges to the WOTUS

Rule], it made sense for Plaintiffs to file in two courts to preserve a forum for their claims." Gov't Br. 24, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016). That perverse state of affairs is now the norm in CWA litigation. Challengers routinely file two actions—one in the district court under the APA, one in the court of appeals under Section 1369(b)—to obtain judicial review of a single CWA regulation. See Pet. 25 n.7 (citing cases). And before either court can address the merits, both must decide which has jurisdiction to proceed.

The end result often turns on which circuit wins the JPML consolidation lottery. In the case challenging EPA's water transfers rule, the JPML consolidated the petitions before the Eleventh Circuit, which dismissed the challenges for lack of jurisdiction. See *Friends of the Everglades*, 699 F.3d at 1285. Here, the JPML consolidated the petitions before the Sixth Circuit, which held that it had jurisdiction under Section 1369(b). Consolidation Order, MCP No. 135 (J.P.M.L. July 28, 2015). The same petitions could very well have been consolidated before the Eleventh Circuit, where two petitions were pending when the JPML ordered consolidation. See *id.* at 2. Had the JPML ordered consolidation before the Eleventh Circuit, that court undoubtedly would have dismissed the petitions for lack of jurisdiction, based on circuit precedent, and the agencies would now be seeking this Court's review, just as they did in *Friends of the Everglades* (No. 13-10). Jurisdiction here was decided by a turn of the JPML wheel.

2. This jurisdictional morass is costly for everyone. The 100 petitioners before the Sixth Circuit have litigated the issue of jurisdiction over challenges to the WOTUS Rule not only before that court, but also before

the Tenth Circuit, the Eleventh Circuit, and over a dozen district courts throughout the Nation.

The courts, too, have suffered from a lack of jurisdictional clarity. Apart from the Sixth Circuit's sharply divided 1-1-1 decision, four district courts have reached incongruous determinations on their jurisdiction under the APA. See Pet. 9, 13. The Eleventh Circuit has published an opinion explaining why it is currently abstaining under *Colorado River* from deciding the issues—an erroneous decision that only kicks the can down the road. See *Georgia* v. *McCarthy*, 2016 WL 4363130 (11th Cir. Aug. 16, 2016) (per curiam).[3] And the Tenth Circuit is scheduled to hear oral argument on the same question in November 2016. See Order, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Sept. 19, 2016).

Meanwhile, no court has yet received a single brief on the merits of the challenges to the June 2015 WOTUS Rule.

3. Any delay of this Court's resolution of the question presented by the petition will inflict additional harm with no corresponding benefits. The agencies have argued that the Sixth Circuit's jurisdictional decision is "as clear and final as

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[3] Federal courts may abstain under *Colorado River* only when state courts are exercising "concurrent jurisdiction." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 818 (1976). But there are no relevant state court proceedings here. Nor are the Sixth Circuit and district courts exercising "concurrent" jurisdiction. *Either* the Sixth Circuit has jurisdiction under Section 1369(b), *or* the district courts have jurisdiction under the APA; "both" is not a possible answer. The Eleventh Circuit should have decided where jurisdiction properly lies. See *Arizona* v. *San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 559-560 (1983) (abstention under *Colorado River* is "improper" if jurisdiction is not "concurrent").

possible," and conclusive "barring intervention by the Supreme Court." Gov't Br. 21-22, 36, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016). If that is so, then future proceedings on the merits in the Sixth Circuit will not shed additional light on the court's jurisdiction.

Nor will further proceedings in the APA actions add clarity. After hearing oral argument in November, the Tenth Circuit must either pick a side in the already-mature debate or, like the Eleventh Circuit, decide not to decide just yet. Neither of those outcomes will establish whether the Sixth Circuit has jurisdiction under Section 1369(b). The same is true for all district courts that have not yet resolved their jurisdiction, including the Texas and Florida district courts in which respondents' challenges are pending. The arguments for and against jurisdiction under Section 1369(b) have been fully developed and aired in the lower courts. The disagreement among the lower courts has been acknowledged by the Eleventh Circuit, the Sixth Circuit, and the Solicitor General; the issue is ripe for this Court's review.

Until this Court intervenes, a cloud of jurisdictional doubt will hover over all court decisions on the WOTUS Rule challenges. If the Sixth Circuit were to reach the merits, some party will lose on some issue. That party could then petition for rehearing or certiorari and contest the Sixth Circuit's jurisdiction. If future jurisdictional challenges are successful, they will wipe away all Sixth Circuit orders, rendering all proceedings from this point forward for naught. There is no need to inflict these additional, avoidable costs on the Sixth Circuit and the parties when this Court can answer the question now.

4. Given the WOTUS Rule's "unique importance" (Gov't Br. 63, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016)), the costs and uncertainties in this case alone are sufficiently weighty to grant certiorari. But the concerns raised here extend beyond the challenges to the WOTUS Rule.

The same jurisdictional issue continues to plague the litigation over the challenges to EPA's water transfers rule, which was issued in 2008. The Eleventh Circuit in *Friends of the Everglades* rejected EPA's argument that Section 1369(b)(1)(F) "appl[ies] to any 'regulations relating to permitting'" and thus dismissed the challenges to the water transfers rule for lack of jurisdiction. 699 F.3d at 1288. The same challenges are now before the Second Circuit on appeal from the APA decision in *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, 8 F. Supp. 3d 500 (S.D.N.Y. 2014). If Judge McKeague is right that the courts of appeals have exclusive jurisdiction under Section 1369(b)(1)(F) to review any regulation that "impact[s] permitting requirements" (Pet. App. 18a), then the Eleventh Circuit erred in *Friends* and the Second Circuit lacks subject matter jurisdiction in *Catskill Mountains*.

EPA has argued to the Second Circuit that it is collaterally estopped from contesting that court's jurisdiction because of its participation in *Friends of the Everglades*. See EPA Br. 3-4 & n.2, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, No. 14-1823 (2d Cir. Sept. 11, 2014). We doubt that absolves a court of its duty to determine whether it has subject matter jurisdiction. But, in any event, there are many appellants (*e.g.*, the Arizona Department of Water Resources) and appellees (*e.g.*, Catskill Mountains Chapter of Trout Unlimited, Inc.) in *Catskill Mountains* that are not bound by *Friends of*

the Everglades. Any party aggrieved by the Second Circuit's merits ruling—or, indeed, any *amicus curiae* in the case—could seek a jurisdictional ruling on rehearing or certiorari. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 280 n.14 (1978) ("*amici*['s]" challenges to "jurisdiction * * * must be considered").

Until this Court resolves the issue, the uncertainties over the scope of Section 1369(b) will continue to beleaguer challenges to the WOTUS Rule, the water transfers rule, and future CWA rulemakings. The substantial public and private costs of the current uncertainty will continue to accrue. This Court can, and should, put an end to this waste by granting the petition for certiorari now.

II. Section 1369(b)(1)(F) Does Not Authorize Court Of Appeals Jurisdiction Over The Challenges To The WOTUS Rule.

The petition convincingly demonstrates that the agencies have badly misinterpreted Section 1369-(b)(1)(F), as two members of the Sixth Circuit panel agreed. Pet. 14-20. Respondents fully concur with petitioner's arguments and will not burden the Court by repeating them here. We offer two additional observations.

1. While the WOTUS Rule might *affect* when Section 1342 permits are or are not required, the Rule is *not* an "Administrator's action * * * in issuing or denying any permit under section 1342," which is the only action to which Section 1369(b)(1)(F) applies. The agencies *admitted* as much throughout the rulemaking process, when they repeatedly described the WOTUS Rule as merely "definitional." See, *e.g.*, Clean Water Rule Response to Comments—Topic 8: Tributaries at 252 ("The agencies further note that the final rule is solely a definitional rule, and specific implementation

of permitting programs, including the CWA NPDES program, are beyond the scope of the rule."); *id.* at 510 ("The final rule does not establish any regulatory requirements. Instead, it is a definitional rule * * *."); 80 Fed. Reg. at 37054 (same).[4] The agencies were correct when they made these admissions during the rulemaking and should not be permitted to contradict them now in litigation.

2. The agencies contended, in their recent Tenth Circuit brief, that Section 1369(b) should be interpreted "pragmatically." Gov't Br. 39, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016). In support of this argument that the text of the statute should be ignored in favor of reaching a result that the agencies prefer, the agencies reasoned that Section 1369(b) is "a 'poorly drafted and astonishingly imprecise statute'" and that "Congress did not anticipate the myriad kinds of regulatory actions that would be necessary to administer the Act's limitations and permitting programs." *Ibid.* The agencies' reasoning, however, provides no support for the exercise of original and exclusive jurisdiction under Section 1369(b).

"The role of [courts] is to apply the statute as it is written—even if [they] think some other approach might accor[d] with good policy." *Burrage* v. *United States*, 134 S. Ct. 881, 892 (2014). That is especially true for questions of subject-matter jurisdiction. A court of appeals only has "jurisdiction to hear petitions for direct review of agency action when Congress says so." *Loan Syndications & Trading Ass'n* v. *SEC*, 818 F.3d 716, 718 (D.C. Cir. 2016). "Whether initial

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[4] The agencies' Response to Comments is available at https://www.epa.gov/cleanwaterrule/response-comments-clean-water-rule-definition-waters-united-states.

subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress and not by any views we may have about sound policy." *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 746 (1985).

Congress specified in Section 1369(b) that only seven narrow categories of EPA actions are to be reviewed directly by the courts of appeals. By no stretch of the imagination can these facial challenges to the WOTUS Rule be said to fall under any of those seven categories, including paragraphs (E) or (F), as the petitioner and two panel members below cogently explained. And no amount of argument that court of appeals review is supposedly more "pragmatic" can overcome the fact that the plain text of Section 1369(b) does not fit these challenges to the Rule. As the petitioner has explained (Pet. 28-31), there are plenty of reasons to believe that district court APA review is in fact the more "pragmatic" approach. But when the statute is this clear on its face, there is no need for the Court to engage in that inquiry: the statute controls until Congress amends it.

Applying the plain text of the CWA, the Sixth Circuit lacked jurisdiction to review the Rule. Jurisdiction lies exclusively in the district courts under the APA. See 5 U.S.C. § 703. The Court should grant certiorari to restore Congress's intent when it enacted Section 1369(b).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

ELLEN STEEN
Counsel of Record
DANIELLE HALLCOM QUIST
American Farm Bureau Federation
600 Maryland Ave. SW, Suite 1000W
Washington, DC 20024
(202) 406-3616
ellens@fb.org

STACY LINDEN
American Petroleum Institute
1220 L Street NW
Washington, DC 20005
(202) 289-4434

NICK GOLDSTEIN
American Road & Transportation Builders Association
1219 28th Street NW
Washington, DC 20007
(202) 289-4434

THOMAS J. WARD
National Association of Home Builders of the United States
1201 15th Street NW
Washington, DC 20005
(202) 266-8230

WILLIAM R. MURRAY
National Alliance of Forest Owners
122 C Street NW, Suite 630
Washington, DC 20001
(202) 747-0742

SCOTT YAGER
National Cattlemen's Beef Association
1275 Pennsylvania Ave. NW, Suite 801
Washington, DC 20004
(202) 879-9102

AMANDA E. ASPATORE
National Mining Association
101 Constitution Ave. NW, Suite 500 East
Washington, DC 20001
(202) 463-2646

MICHAEL C. FORMICA
National Pork Producers Council
122 C. Street NW, Suite 875
Washington, DC 20001
(202) 347-3600

JAMES T. RILEY
National Stone, Sand & Gravel Association
1605 King Street
Alexandria, VA 22314
(703) 526-1084

KRISTY A.N. BULLEIT
ANDREW J. TURNER
KARMA B. BROWN
Hunton & Williams LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037
(202) 955-1500
Counsel for the Utility Water Act Group

MOHAMMAD O. JAZIL
DAVID W. CHILDS
BROOKE E. LEWIS
Hopping Green & Sams, P.A.
119 South Monroe Street, Suite 300
Tallahasee, FL 32301
(850) 425-7500
Counsel for the Southeast Stormwater Association and Florida Stormwater Association

Counsel for Respondents

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PETITIONER

v.

DEPARTMENT OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY H. WOOD
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
DANIEL R. DERTKE
AMY J. DONA
ANDREW J. DOYLE
J. DAVID GUNTER II
ROBERT J. LUNDMAN
MARTHA C. MANN
JESSICA O'DONNELL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

KEVIN S. MINOLI
Acting General Counsel
KARYN I. WENDELOWSKI
Attorney
United States Environmental Protection Agency
Washington, D.C. 20460

EARL G. MATTHEWS
Acting General Counsel
CRAIG R. SCHMAUDER
Deputy General Counsel
Department of the Army
Washington, D.C. 20310

DAVID COOPER
Chief Counsel
DANIEL INKELAS
Attorney
United States Army Corps of Engineers
Washington, D.C. 20314

QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under 33 U.S.C. 1369(b)(1) over petitions for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act, 33 U.S.C. 1251 *et seq.*

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 817 F.3d 261.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48a-50a) was entered on February 22, 2016. Petitions for rehearing were denied on April 21, 2016 (Pet. App. 51a-52a). On July 1, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 2, 2016, and the petition was filed on that date. The petition was granted on January 13, 2017. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth at App. 1a-43a, *infra*.

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Central to the Act is Section 1311, which generally bars "the discharge of any pollutant by any person," 33 U.S.C. 1311(a), unless the person who discharges the pollutant "obtain[s] a permit and compl[ies] with its terms." *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted); see, *e.g.*, *NRDC, Inc.* v. *U.S. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) (describing the prohibition on unlicensed discharges as the statute's "first principle"); see also *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 298 (2009) (Ginsburg, J., dissenting) (describing this provision as the statute's "core command").

A "discharge of a pollutant" occurs when a person adds "any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). "[N]avigable waters," in turn, are "the waters of the United States." 33 U.S.C. 1362(7). Accordingly, whether a person's conduct is subject to the prohibition set forth in Section 1311(a) generally depends on whether (1) a pollutant (2) was added (3) to waters of the United States (4) from a point source. See, *e.g.*, *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988).

If Section 1311 applies, a discharge of pollutants must generally be authorized by a permit under the National Pollutant Discharge Elimination System (NPDES)

program. 33 U.S.C. 1311, 1342. NPDES permits may be issued by the EPA Administrator or by a State that is authorized to operate an NPDES program. They generally control discharges from point sources to waters of the United States by establishing permissible rates, concentrations, quantities of specified constituents, or other limitations and conditions as appropriate. See 33 U.S.C. 1342(a)(1) and (2); 40 C.F.R. Pts. 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000).

Discharges of "dredged or fill material" can be authorized under a separate permitting program operated by the Secretary of the Army, acting through the United States Army Corps of Engineers (the Corps), or by an authorized State. 33 U.S.C. 1344(a), (d), and (g); see generally 33 C.F.R. Pts. 320-332; 40 C.F.R. Pts. 230-232; see, *e.g.*, *Coeur Alaska, Inc.*, 557 U.S. at 266, 268-269. In addition to limiting discharges of pollutants through Section 1311 and related provisions, the CWA contains a variety of other provisions that assist in achieving the Act's basic purposes. *Inter alia*, the Act creates research and related programs, 33 U.S.C. 1251-1275 (2012 & Supp. III 2015); provides for grants for construction of treatment works, 33 U.S.C. 1281-1301 (2012 & Supp. II 2014); and authorizes grants to the States, 33 U.S.C. 1381-1387 (2012 & Supp. II 2014).

b. To "establish a clear and orderly process for judicial review," the CWA vests federal courts of appeals with exclusive original jurisdiction to review certain categories of EPA decisions implementing the Act. H.R. Rep. No. 911, 92d Cong., 2d Sess. 136 (1972) (House Report); see S. Rep. No. 414, 92d Cong., 1st Sess. 85 (1971) (Senate Report) (noting the need for "even and con-

sistent" application of nationwide administrative actions). Actions reviewable directly in the courts of appeals include actions of the EPA Administrator:

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title [the section authorizing NPDES permits].

33 U.S.C. 1369(b)(1).[1]

A petition for review generally must be filed within 120 days after the challenged agency action. 33 U.S.C. 1369(b)(1). When multiple petitions challenge a single action, the petitions are consolidated in one court of appeals, which is chosen randomly from among the circuits in which petitions were filed in the ten days after the challenged action occurred. 28 U.S.C. 2112(a)(3). Any agency action "with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2); see *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 607 (2013). Section 1369(b) thus promotes the ability of the regulated community, regulators, and the public to rely on the validity of agency actions that are not promptly challenged or that are upheld by a court of appeals.

Final EPA actions that are reviewable under principles of administrative law, but for which direct review in the courts of appeals is not authorized by Section 1369(b)(1), may be challenged in federal district court

---

[1] Five additional categories of EPA actions are subject to court of appeals review, 33 U.S.C. 1369(b)(1)(A)-(D) and (G), but those categories are not at issue in this case.

under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 5 U.S.C. 704; 28 U.S.C. 1331. An APA action may be brought at any time within six years after the date of the challenged action. 28 U.S.C. 2401(a).

c. In 2015, EPA and the Corps jointly promulgated the Clean Water Rule (the Rule). 80 Fed. Reg. at 37,054. The Rule amended the regulatory definition of the CWA term "waters of the United States," which governs the geographic scope of effluent limitations under Section 1311 and the coverage of other provisions of the Act.

EPA and the Corps had previously issued regulations that defined the term "waters of the United States," see 42 Fed. Reg. 37,124, 37,127 (July 19, 1977); 51 Fed. Reg. 41,216-41,217 (Nov. 13, 1986), but this Court had held that the agencies' application of that definition was overbroad in some respects, *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). In addition, the prior regulations did not provide detailed guidance for determining whether particular wetlands were CWA-protected "waters of the United States." See *Rapanos* v. *United States*, 547 U.S. 715, 782 (2006) (Kennedy, J., concurring in the judgment). Several Members of this Court accordingly suggested that the agencies "clarif[y] * * * the reach" of the statute by further developing a definition of the term "waters of the United States." *Sackett* v. *EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring); see *Rapanos*, 547 U.S. at 757-758 (Roberts, C.J., concurring); 547 U.S. at 811-812 (Breyer, J., dissenting). The Chief Justice, for example, noted that while EPA and the Corps have "generous leeway" in interpreting the

CWA, their jurisdictional determinations would necessarily proceed "on a case-by-case basis" unless and until those agencies finalized a clarifying rule on the scope of their authority. *Rapanos*, 547 U.S. at 757-758 (Roberts, C.J., concurring). Between the *Rapanos* decision and the promulgation of the Clean Water Rule, the Corps and EPA "made more than 400,000 CWA jurisdictional determinations," including more than 120,000 site-specific determinations that particular waters bore a sufficient nexus to navigable waters to qualify them as waters of the United States. 80 Fed. Reg. 37,065 (June 29, 2015).

The Clean Water Rule was intended to "provid[e] simpler, clearer, and more consistent approaches for identifying the geographic scope" of the Act. 80 Fed. Reg. at 37,057. The Rule identifies "three basic categories" of waters: "Waters that are jurisdictional in all instances, waters that are excluded from jurisdiction, and a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional." *Ibid.* The agencies specified that the Rule was issued under the legal authority provided by the CWA, including Section 1311, which governs effluent limitations, and Section 1342, which governs NPDES permitting. *Id.* at 37,055.

2. a. Soon after the promulgation of the Clean Water Rule, numerous parties challenged the Rule in the courts of appeals, invoking the authorization for direct court of appeals review in Section 1369(b)(1). The challengers included respondents Agrowstar, et al.; respondents Amicus Farm Bureau Federation, et al.; the respondent States; and respondents Waterkeeper Alliance, et al.

The challenges were consolidated in the Sixth Circuit, which issued a nationwide stay of the Clean Water Rule pending further proceedings. See Pet. App. 3a, 5a. Petitioner intervened in the consolidated suits and moved to dismiss them, contending that the court of appeals lacked jurisdiction to consider the Clean Water Rule and that litigation over the Rule's validity should instead occur in district court.

b. The court of appeals denied petitioner's motion, concluding that the challenges had been properly brought under Section 1369(b)(1). Pet. App. 3a-45a.

i. Judge McKeague, who announced the judgment of the court, concluded that two provisions of Section 1369(b)(1) authorized immediate court of appeals review of the Clean Water Rule. Pet. App. 3a-26a. He found the Rule to be reviewable under 33 U.S.C. 1369(b)(1)(E), which covers "any effluent limitation or other limitation" under provisions including Section 1311. He concluded that the Rule establishes a limitation because the Rule's definition of "waters of the United States" expanded "regulatory authority in some instances," thereby "impos[ing] * * * additional restrictions on the activities of some property owners" and "altering permit issuers' authority to restrict point-source operators' discharges into covered waters." Pet. App. 15a. Judge McKeague further observed that EPA had relied in part on Section 1311(a) as a source of its authority to promulgate the Rule. *Id.* at 15a-16a n.4.

Judge McKeague concluded that the court of appeals also had jurisdiction to review the Clean Water Rule under 33 U.S.C. 1369(b)(1)(F), which authorizes review of EPA action "in issuing or denying any permit" under the NPDES program. Pet. App. 17a-24a. He observed that this Court in *Crown Simpson Pulp Co.* v. *Costle*,

445 U.S. 193, 196-197 (1980) (per curiam), had rejected a "strict literal application" of Section 1369(b)(1)(F), and had construed the provision to encompass agency action that is "functionally similar" to the issuance or denial of a permit. Pet. App. 17a. Relying on *Crown Simpson* and on a subsequent Sixth Circuit decision, Judge McKeague concluded that, because the Clean Water Rule "indisputably expands regulatory authority and impacts the granting and denying of permits in fundamental ways," the rule is reviewable under Section 1369(b)(1)(F). *Id.* at 21a.

ii. Judge Griffin concurred in the judgment. Pet. App. 27a-45a. He agreed that Section 1369(b)(1)(F) vested the court of appeals with jurisdiction under Sixth Circuit precedent, which he saw as consistent with "the predominant view of the other circuits." *Id.* at 44a & n.2. He explained, however, that if that binding circuit authority were absent, he would have concluded that the rule was not subject to review under Section 1369(b)(1)(F). *Id.* at 45a. Judge Griffin also concluded that the Clean Water Rule was not reviewable under Section 1369(b)(1)(E). *Id.* at 29a-38a. In his view, the Rule does not establish an "other limitation" within the meaning of that provision because the Rule interprets a term in the Act's definitional section and "sets the jurisdictional reach for whether the discharge limitations even apply in the first place." *Id.* at 32a.

iii. Judge Keith dissented. He would have held that neither Section 1369(b)(1)(E) nor Section 1369(b)(1)(F) conferred jurisdiction to review the Clean Water Rule. Pet. App. 45a-47a.

c. After this Court granted certiorari, the Sixth Circuit issued an order holding all further proceedings in abeyance. 15-3751 C.A. Doc. 171-2 (Jan. 25, 2017).

3. Meanwhile, petitioner and other parties filed at least 16 parallel APA challenges to the Clean Water Rule in district courts throughout the country. See Pet. Br. vi. The Judicial Panel on Multidistrict Litigation (MDL) denied the federal government's motion to consolidate the pending district court challenges, concluding that the MDL statute (28 U.S.C. 1407) did not support consolidation of litigation centered on questions of law, and that the varying procedural postures of the challenges counseled against consolidation. *In re: Clean Water Rule: Definition of "Waters of the United States,"* 140 F. Supp. 3d 1340 (J.P.M.L. 2015).

Six of the district courts in which challenges to the Clean Water Rule were filed have ruled on their jurisdiction. Five of the six have concluded that they lack jurisdiction because Section 1369(b)(1) vests the courts of appeals with original and exclusive jurisdiction. See *Washington Cattlemen's Ass'n* v. *United States EPA*, No. 15-3058, 2016 WL 6645765, at *3 (D. Minn. Nov. 8, 2016); *Ohio* v. *United States EPA*, 15-cv-2467 Docket entry No. 54, at 1 (S.D. Ohio Apr. 25, 2016); *Oklahoma ex rel. Pruitt* v. *United States EPA*, No. 15-cv-381, 2016 WL 3189807, at *2 (N.D. Okla. Feb. 24, 2016); *Georgia* v. *McCarthy*, No. CV 215-79, 2015 WL 5092568, at *1 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp.* v. *United States EPA*, No. 15-cv-110, 2015 WL 5062506, at *1 (N.D. W. Va. Aug. 26, 2015). One district court has held that it has jurisdiction to review the Rule. See *North Dakota* v. *U.S. EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015).

4. On February 28, 2017, the President issued an Executive Order directing EPA and the Corps to reconsider the Clean Water Rule. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The order declared it

to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." *Id.* § 1(a). It directed the issuing agencies to review the Rule for consistency with those objectives, and it instructed the agencies to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." *Id.* § 2(a).

The agencies subsequently issued a notice of proposed rulemaking entitled "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules." 82 Fed. Reg. 34,899 (July 27, 2017). That notice proposes to rescind the Clean Water Rule and to recodify the prior regulatory definition of "waters of the United States" before beginning a new rulemaking process concerning the term.[2] *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals has jurisdiction to review the Clean Water Rule under the CWA provision authorizing direct appellate review. Jurisdiction is authorized under Section 1369(b)(1)(E), because a rule establishing the geographic scope of Section 1311's ban on unpermitted pollutant discharges imposes a "limitation under Section 1311," 33 U.S.C. 1369(b)(1)(E). And jurisdiction is also authorized under Section 1369(b)(1)(F), as construed in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S.

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[2] On March 6, 2017, the United States moved to hold the briefing schedule in this case in abeyance in light of the Executive Order and the attendant prospect that the Clean Water Rule will be rescinded or revised. On April 3, 2017, this Court denied that motion.

193, 196 (1980) (per curiam), because the Clean Water Rule establishes the boundaries of EPA's permitting authority. That reading of Section 1369(b)(1) is consistent with its text and history, and avoids the "truly perverse," *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977), and "seemingly irrational" bifurcation of closely related determinations between the district courts and courts of appeals, *Crown Simpson*, 445 U.S. at 197.

A. 1. Direct appellate review of the Clean Water Rule is authorized under Section 1369(b)(1)(E). Subparagraph (E) authorizes courts of appeals to review any EPA action "in approving or promulgating any effluent limitation or other limitation under" Section 1311—the provision that generally bars the discharge of pollutants except in compliance with requirements set out under the Act. 33 U.S.C. 1369(b)(1)(E). The expansive word "any" in Subparagraph (E) indicates that the subparagraph authorizes review of every sort of limitation under Section 1311.

The Clean Water Rule fits within that category. Effluent and other limitations under Section 1311 apply only to discharges of pollutants to "navigable waters," 33 U.S.C. 1311(a), 1362(12), which the Act defines as "the waters of the United States," 33 U.S.C. 1362(7). As a result, a rule defining certain waters as "waters of the United States" controls the geographic scope of all limitations imposed under Section 1311. Such a rule imposes restrictions on the activities of property owners and others, by generally prohibiting discharges of pollutants to the waters that the rule covers unless the discharges are authorized by permits. See 33 U.S.C. 1311, 1342, 1344. Indeed, the challengers object to the Clean

Water Rule precisely on the ground that it will constrain conduct on the covered waters. The Clean Water Rule also imposes limitations on permitting authorities. EPA and the States that issue NPDES permits are required to process applications for discharges of pollutants to waters that meet the Clean Water Rule's definition of "waters of the United States," and to incorporate into permits for discharges to those waters the effluent limitations promulgated under Section 1311. 33 U.S.C. 1311(a), 1342.

2. The Clean Water Rule is also reviewable under Section 1369(b)(1)(F). Subparagraph (F) authorizes direct appellate review of EPA action "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F). In *Crown Simpson*, this Court agreed that Subparagraph (F) is properly understood to reach EPA actions that are "functionally similar" to the denial of a permit, because that interpretation "best comport[s] with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." 445 U.S. at 196. This Court also stated that Subparagraph (F) should be construed to avoid a "seemingly irrational bifurcated system" in which closely related EPA actions are routed to different levels of the courts. *Id.* at 196-197.

Under the functional approach of *Crown Simpson*, the Clean Water Rule is reviewable under Subparagraph (F). The CWA requires permits only for discharges to "waters of the United States." 33 U.S.C. 1342, 1362(7) and (12). As a result, the Clean Water Rule controls whether permits may or may not be issued for the bodies of water that it describes. Moreover, a narrow construction of Subparagraph (F) would result in a "seemingly irrational bifurcated system" of

review. 445 U.S. at 197. A challenge to an EPA determination that a particular site contains "waters of the United States" in an individual NPDES permitting decision would be reviewable directly in the court of appeals, but EPA's resolution of the same question on a more categorical basis through the Clean Water Rule would instead be reviewed in district courts across the country. Because that approach is not consistent with *Crown Simpson*, courts of appeals have generally construed Subparagraph (F) to cover rules that delineate EPA's jurisdiction to issue permits.

B. Petitioner's reading of Section 1369(b)(1) cannot be reconciled with the provision's structure and purpose. By routing cases directly to the courts of appeals, and requiring challenges to be brought within 120 days, Section 1369(b)(1) facilitates quick and orderly resolution of disputes concerning important rules that govern the scope of the CWA.

This Court has construed Section 1369(b)(1) to afford this expedited review to a coherent class of EPA actions, so that intertwined agency actions are routed through the same channels. In *E.I. du Pont*, this Court considered whether Section 1369(b)(1)(E) should be construed to provide direct appellate review for grants and denials of individual variance permits under Section 1311, but not "effluent limitations for classes and categories of existing point sources." 430 U.S. at 136. This Court rejected that interpretation, explaining that it "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions."

Ibid. The Court in *E.I. du Pont* relied on the same functional considerations in construing the scope of EPA's authority "to issue regulations establishing effluent limitations for classes of plants" under Section 1311, *id.* at 124, explaining that it would be "highly anomalous" if the agency's new-source regulations "were directly reviewable in the Court of Appeals," *id.* at 127-128, while existing-source standards "based on the same administrative record were reviewable only in the District Court," *id.* at 128. The Court in *Crown Simpson* similarly emphasized that Section 1369(b)(1) should be construed to avoid seemingly irrational bifurcation of related determinations. 445 U.S. at 196-197.

Petitioner's interpretation would create the irrational bifurcation that the Court in *E.I. du Pont* and *Crown Simpson* sought to avoid. Petitioner would construe Section 1369(b)(1)(E) as creating appellate jurisdiction to review EPA regulations setting numerical or qualitative effluent limitations, while authorizing district courts throughout the country to review regulations governing the same limits' geographic scope. That bifurcation would hinder regulated parties' efforts to obtain prompt clarification of their responsibilities under the CWA. Petitioner's narrow construction of Section 1369(b)(1)(F) would similarly generate "the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits * * * but would have no power of direct review of the basic regulations" establishing jurisdiction over those individual actions. *E.I. du Pont*, 430 U.S. at 136.

C. The CWA's legislative history confirms that Section 1369(b)(1) creates direct appellate jurisdiction over the Clean Water Rule. The House and Senate debates reflect an understanding that Section 1369(b)(1) would

generally provide jurisdiction over challenges to nationwide rules that EPA promulgated to implement the Act. For instance, the Senate Report stated that Section 1369(b)(1) would authorize expedited, centralized review of the "requirements, standards and regulations" that EPA established under the Act. Senate Report 84-85. And the Conference Report indicated that Section 1369(b)(1) would govern "any suit against a federal standard." H.R. Conf. Rep. No. 1465, 92d Cong., 2d Sess. 147 (1972). (Conference Report) Those descriptions counsel strongly against petitioner's interpretation of the statute. A judicial-review provision that did not reach a rule defining the geographic scope of the CWA's central provisions could not even loosely be described as covering EPA's "requirements, standards and regulations" under the Act or as conferring appellate jurisdiction over "any suit against a Federal standard" under the statute.

Congress's subsequent treatment of Section 1369(b)(1) is also inconsistent with petitioner's interpretation of the statute. After a functional approach to Section 1369(b)(1) was well-established in the decisions of this Court and the courts of appeals, Congress amended Section 1369(b)(1) to provide direct appellate review of certain additional decisions—but did not narrow the judicial-review provision's scope. That choice provides additional reason to adhere to the functional framework that Congress left in place.

A 1977 debate over a failed proposal to centralize review of nationwide regulations under the CWA in the D.C. Circuit provides further evidence of the broad scope of Section 1369(b)(1). Both supporters and opponents of the 1977 centralization proposal made clear their understanding that if Section 1369(b)(1) were left

untouched, the validity of major nationwide standards under the CWA would be litigated in the regional circuits—not in the district courts.

D. Any remaining ambiguity should be resolved in favor of appellate jurisdiction. The Court in *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 (1985), held that if a statute contains a provision for direct appellate review, a court should "not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals" without "a firm indication" that Congress intended the claim at issue to be pursued in the district court. *Id.* at 745. That principle applies here, and confirms that the court of appeals has jurisdiction to consider challenges to the Clean Water Rule.

ARGUMENT

THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE CLEAN WATER RULE

The CWA's judicial-review provision, 33 U.S.C. 1369(b)(1), vests the court of appeals with jurisdiction to consider the validity of the Clean Water Rule. First, the court of appeals has jurisdiction under Section 1369(b)(1)(E), because a rule establishing the geographic scope of Section 1311's ban on unpermitted pollutant discharges imposes a "limitation under Section 1311." 33 U.S.C. 1369(b)(1)(E). Second, the court of appeals has jurisdiction under Section 1369(b)(1)(F), because the Clean Water Rule establishes the boundaries of EPA's permitting authority. That reading of the pertinent jurisdictional provisions is consistent with their text and history, as well as with this Court's guidance that Section 1369(b)(1) should be construed to avoid the irrational bifurcation of closely related determinations. See *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193,

197 (1980) (per curiam); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977).[3]

A. The Clean Water Rule Is Subject To Direct Appellate Review Under The Text Of Both Section 1369(b)(1)(E) And 1369(b)(1)(F)

Both Section 1369(b)(1)(E) and Section 1369(b)(1)(F) authorize direct court of appeals review of the Clean Water Rule.

1. The Clean Water Rule is reviewable under Section 1369(b)(1)(E)

a. Section 1369(b)(1)(E) encompasses all EPA actions that impose limitations of any sort under Section 1311—the provision that forbids the discharge of pollutants except in compliance with specified provisions of the Act. The term "effluent limitation" is defined broadly, as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constit-

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[3] One of the respondents contends (Waterkeeper Resps. Br. 16-17, 24-26) that Section 1369(b)(1) does not allow review of the Clean Water Rule because the Assistant Secretary of the Army participated in the rulemaking. That argument lacks merit. The CWA authorized the Administrator to issue the Clean Water Rule. See 33 U.S.C. 1361(a) (specifying that the Administrator may "prescribe such regulations as are necessary to carry out [her] functions under" the Act); see *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 Op. Att'y Gen. 197 (1979) (explaining that EPA has overall responsibility for administration of the Act, including the authority to interpret the term "navigable waters"). Section 1369(b)(1) authorizes "[r]eview of the [EPA] Administrator's action" in promulgating or approving effluent limitations under Section 1311 and in issuing or denying NPDES permits, whether or not an additional federal agency participates in the rulemaking. 33 U.S.C. 1369(b)(1).

uents which are discharged from point sources into" waters of the United States. 33 U.S.C. 1362(11). In addition to "effluent limitation[s]," Section 1369(b)(1)(E) encompasses the Administrator's promulgation of any "other limitation" under Section 1311. 33 U.S.C. 1369(b)(1)(E).

Section 1369(b)(1)(E)'s broad coverage is reinforced by Congress's repeated use of the word "any" across the relevant provisions. This Court has emphasized that "the word 'any' has an expansive meaning"—"one or some indiscriminately of whatever kind." *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002) (citation omitted). Here, Congress used "any" both in the CWA's definition of "effluent limitation," 33 U.S.C. 1362(11), and in Section 1369(b)(1)(E)'s identification of the "effluent limitation[s] or other limitation[s]" that would be reviewable in the court of appeals, 33 U.S.C. 1369(b)(1)(E). That wording confirms that the statute should be read to reach all limitations of whatever kind that are imposed under Section 1311. Cf. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219-220 (2008) ("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind."); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (stating that, when "Congress did not add any language limiting the breadth" of "the phrase 'any other term of imprisonment,'" the Court should "read [it] as referring to all 'term[s] of imprisonment'") (citation omitted; brackets in original); see *Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1 (1871).

EPA's action in issuing the Clean Water Rule readily qualifies as action promulgating or approving an "other limitation" under Section 1311. Limitations imposed

under Section 1311 apply only to discharges of pollutants to "navigable waters," 33 U.S.C. 1311(a), 1362(12), which the CWA defines as "the waters of the United States," 33 U.S.C. 1362(7). A rule that specifies which sites are "waters of the United States" imposes on persons who discharge pollutants to those waters the full panoply of effluent and other limitations under Section 1311. As a consequence of that directive, pollutant discharges to the covered waters are generally prohibited unless authorized by a permit. See 33 U.S.C. 1311, 1342, 1344. A rule that delineates the geographic scope of limitations promulgated under Section 1311 is thus every bit as integral to the CWA's practical effect on regulated parties as are the quantitative or qualitative requirements. In order for a regulated party to know what it is prohibited from doing, the party must know *both* those quantitative and qualitative requirements *and* the requirements' geographic scope.

Moreover, as Judge McKeague explained below, the rule "expan[ds] * * * regulatory authority in some instances" and thereby "impos[es] * * * additional restrictions on the activities of some property owners." Pet. App. 15a; see *Georgia* v. *McCarthy*, No. CV 215-79, 2015 WL 5092568, at *2 (S.D. Ga. Aug. 27, 2015) (explaining that the Clean Water Rule falls within Section 1369(b)(1)(E) because its "undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the [CWA's] permit program"); *Murray Energy Corp.* v. *United States EPA*, No. 15-cv-110, 2015 WL 5062506, at *5 (N.D. W. Va. Aug. 26, 2015) ("Here, there is no dispute that the Clean Water Rule will have an impact on Murray's permitting requirements.").

Indeed, the challengers here object to the Clean Water Rule on the ground that it subjects them and others to restrictions under Section 1311 and related provisions. For example, petitioner's complaint alleges that the Rule "imposes impossible burdens" with which its members must "comply," and that it requires those members "either to alter their activities * * * or to obtain permits when previously they would not have had to." *American Farm Bureau Fed'n* v. *EPA*, 15-cv-165 Docket entry No. 1, at 3, 12, 14 (S.D. Tex. July 2, 2015). The Business and Municipal challengers assert that the rule subjects to CWA requirements waters that were not previously covered. Business and Municipal Challengers Br., 15-3751 C.A. Doc. 129-1, at 40-41, 58 (Nov. 1, 2016). And the state challengers assert that the rule would substantially burden state activities by subjecting additional waters to the Act's limitations. State Pets. Br., 15-3751 C.A. Doc. 128, at 63-64 (Nov. 1, 2016). While the federal respondents have disputed whether the Rule results in a net expansion of CWA jurisdiction, there is no dispute that the Rule categorically classifies as "waters of the United States" certain waters that previously would have been classified as such only based on a case-by-case analysis under *Rapanos* v. *United States*, 547 U.S. 715 (2006). See, *e.g.*, 33 C.F.R. 328.3(a)(6) and (c)(1) (categorical rule for adjacent wetlands).

The understanding that Section 1369(b)(1)(E) reaches regulations like the Clean Water Rule comports with common usage. To determine the extent of the "limitations" that a particular law imposes, one must identify the geographic coverage of the law as well as the range of conduct it forbids. Thus, a Sunday "blue law" that covered an entire State would impose greater

limitations on alcohol sales than a law that prohibited the same conduct but applied only within a single county. The Clean Water Rule's definition of the term "waters of the United States" is similarly integral to any effort to identify the "limitations" that Section 1311 imposes.[4]

The Clean Water Rule imposes corresponding limitations on permitting authorities as well. EPA and the States that issue NPDES permits are required to process permit applications for discharges of pollutants to waters that meet the Rule's definition of "waters of the United States," and to incorporate into permits they issue for discharges to those waters the effluent limitations promulgated under Section 1311. 33 U.S.C. 1311(a), 1342. Thus, by providing that particular waters are "waters of the United States," the Rule requires permitting authorities to subject discharges to those waters to the limitations of Section 1311. The

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[4] Many of the challengers argue that the Clean Water Rule is objectionable because it reflects an impermissible broadening of the prior regulatory definition of the term "waters of the United States." See p. 20, *supra*. The applicability of Section 1369(b)(1)(E), however, does not depend on that circumstance, since the availability of immediate court of appeals review turns on the nature of the challenged EPA action, not on the gravamen of the plaintiff's legal challenge. Thus, if EPA amended a numerical effluent limitation to make it less stringent than it previously had been, the amended limitation would be an "effluent limitation" subject to court of appeals review under Section 1369(b)(1)(E), even if the plaintiff asserted that EPA should have adhered to the prior more stringent version. Similarly here, the agencies' regulatory definition of "waters of the United States" is part and parcel of the overall "limitation[s]" that the CWA places on potential dischargers and on permit issuers. 33 U.S.C. 1369(b)(1)(E). As such, the reviewability of the Clean Water Rule does not depend on whether a challenger asserts that the Rule is too broad or too narrow.

plaintiffs who challenge the Clean Water Rule have acknowledged that effect, with the state respondents in support of petitioner seeking a stay of the Rule in part on the ground that it requires them to "create, process, and issue additional NPDES permits." 15-3799 C.A. Doc. 24, at 19 (Sept. 9, 2015) (citation omitted). The Clean Water Rule thus imposes "limitations on point-source operators and permit issuing authorities" alike. Pet. App. 17a.

Section 1311, moreover, is clearly designed so that critical aspects of its limitations are imposed through EPA regulations that define statutory terms. Section 1311 requires the achievement of "effluent limitations for point sources * * * which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title," 33 U.S.C. 1311(b)(1)(A), and of effluent limitations for certain publicly owned treatment works "based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title," 33 U.S.C. 1311(b)(1)(B). Those provisions reflect Congress's intent that regulations defining the terms "best practicable control technology currently available" and "secondary treatment" would be among the mechanisms through which the Administrator imposed limitations under Section 1311. 33 U.S.C. 1311(b)(1)(A) and (B).

b. Petitioner does not dispute that the Clean Water Rule has the practical effect of subjecting property owners and other pollutant dischargers to effluent and other limitations promulgated under Section 1311. Petitioner suggests, however, that the Clean Water Rule does not impose "limitation[s]" within the meaning of Section 1369(b)(1)(E) because the Rule is not "self-

executing," but instead "operates in conjunction with other sections scattered throughout the Act." Pet. Br. 29 (quoting Pet. App. 31a (Griffin, J., concurring in the judgment)). Judicial review under Section 1369(b)(1)(E), however, is not confined to direct or freestanding limitations, but instead extends broadly to "*any* effluent limitation or *other limitation*." 33 U.S.C. 1369(b)(1)(E) (emphasis added).

Other aspects of the statutory scheme further belie petitioner's view that Section 1369(b)(1)(E) reaches only self-executing or direct limitations. Many of the numerical and qualitative limitations that petitioner acknowledges are reviewable under Section 1369(b)(1)(E) are "not self-executing," but instead "achieve their bite only after they have been incorporated into NPDES permits." *Texas Oil & Gas Ass'n* v. *United States EPA*, 161 F.3d 923, 928 (5th Cir. 1998). For example, the CWA directs EPA to issue regulations that "identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available" for classes of point sources. 33 U.S.C. 1314(b)(1)(A). EPA rules identifying "the degree of effluent reduction attainable" through best practices, *ibid.*, are not self-executing, however; they are instead "made binding on individual dischargers" only through NPDES permits. *Texas Oil*, 161 F.3d at 928; see *American Petroleum Inst.* v. *EPA*, 661 F.2d 340, 344 (5th Cir. 1981) (explaining that NPDES permits "transform[] generally applicable effluent limitations . . . into obligations (including a timetable for compliance) of the individual discharger") (citation and internal quotation marks omitted).

If Congress had authorized court of appeals review only of "direct" or "self-executing" limitations, moreover, a rule's reviewability could turn not on the rule's substantive effect, but on how the rule was phrased. For example, the agencies could have issued a rule stating that, except as provided in other regulatory provisions governing the issuance of permits, "no person may add any pollutant from a point source to any of the following waters." That wording would have conveyed even more starkly the centrality of the covered-waters definition to an understanding of the "limitations" that the rule placed on regulated parties' conduct. Taken together, however, the Clean Water Rule and the regulatory provisions that set out effluent limitations constitute the substantive equivalent of that "self-executing" or "direct" limitation. See 80 Fed. Reg. at 37,054 ("Programs established by the CWA * * * such as the section [1342] National Pollutant Discharge Elimination System * * * permit program * * * all rely on the definition of 'waters of the United States.'").

Petitioner also argues (Pet. Br. 29-30; see Waterkeeper Resps. Br. 13, 14 n.2) that, under the interpretive canons of *ejusdem generis* and *noscitur a sociis* and the rule against superfluities, the phrase "other limitation," 33 U.S.C. 1369(b)(1)(E), should be understood to reach only "effluent-like" limitations. Pet. Br. 39. Petitioner's reliance on those canons is misplaced.

The *ejusdem generis* canon addresses the interpretation of a general phrase that "follows a list of specifics" from which it is possible to infer some shared property. *James* v. *United States*, 550 U.S. 192, 199 (2007), overruled on unrelated grounds by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). In contrast, a phrase that

is "disjunctive, with one specific and one general category," "does not lend itself to application of the canon." *Ali*, 552 U.S. at 225; see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 206 (2012) (Scalia & Garner) (stating that "*ejusdem generis* generally requires at least two words to establish a genus—before the *other*-phrase"—and that "'[t]heaters and other places of public entertainment' does not invoke the canon"). Petitioner cites (Br. 30) *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001), for its articulation of the *ejusdem generis* canon. The statutory provision in that case, however, contained a general term following a list of specific terms from which it was possible to infer a shared property, and the Court described the canon as coming into play "where general words follow specific *words* in a statutory enumeration." *Id.* at 114-115 (brackets and citation omitted; emphasis added). Petitioner identifies no decision of this Court suggesting, contrary to *Ali*, that *ejusdem generis* applies when a catch-all follows a single specific example.

Petitioner's reliance on the related canon of *noscitur a sociis* is similarly misplaced. Under the principle that a word's meaning is "known from its associates," "[c]ourts may clarify the meaning of doubtful words in an ambiguous statute by reference to other associated words and phrases." 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:16, at 353 (rev. 7th ed. 2014). Thus, if a statute refers to "'tacks, staples, nails, brads, screws, and fasteners,' it is clear from the words with which they are associated that the word *nails* does not denote fingernails and that *staples* does not mean reliable and customary food items." Scalia & Garner 196. But the

canon is used only to construe terms that are ambiguous, not to alter the meaning of words that are simply broad. See, *e.g.*, *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 520 (1923) (noting that "[*n*]*oscitur a sociis* is a well established and useful rule of construction where words are of obscure or doubtful meaning and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words").

Even if "other limitation" were an ambiguous term, *noscitur a sociis* would not aid petitioner. That canon sheds light on the meaning of a statute that contains a "string of statutory terms," *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378-380 (2006), because when "several items in a list share an attribute," that fact "counsels in favor of interpreting the other items as possessing that attribute as well," *Beecham* v. *United States*, 511 U.S. 368, 371 (1994). But when a provision lists just two items, this Court has declined to hold that "pairing a broad statutory term with a narrow one shrinks the broad one," explaining that "*noscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate." *S.D. Warren Co.*, 547 U.S. at 379-380; see *id.* at 379 (explaining that it is not possible "to extrapolate a common feature from what amounts to a single item"). Within Section 1369(b)(1)(E), moreover, the terms "effluent limitation" and "other limitation" both refer to limitations that arise under the enumerated statutory sections. There is no logical reason to view the intended common attribute of the two terms as the "effluent-like" character of the limitations they reference, rather than simply the connection to Section 1311, 1312, 1316, or 1345 that Section 1369(b)(1)(E) explicitly requires. See *Ali*, 552 U.S. at

225, 226 (concluding that *noscitur a sociis* did not support limiting the catch-all portion of "any officer of customs or excise or any other law enforcement officer" because the statutory language was not "inconsistent with the conclusion that 'any other law enforcement officer' sweeps as broadly as its language suggests").

Petitioner further argues that "other limitation" should be construed narrowly because "[a] contrary reading would render superfluous the specific words *effluent limitation*." Pet. Br. 30 (brackets, citation, and internal quotation marks omitted). Congress could have replaced those two phrases with a single broad term such as "any limitation." But Congress routinely pairs a specific example with an expansive phrase, for emphasis or clarity. This Court has often addressed such provisions and has given them their natural reading. See, *e.g.*, *Buck* v. *Davis*, 137 S. Ct. 759, 777-778 (2017); *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 562 U.S. 277, 280-281 (2011); *Ali*, 552 U.S. at 224, 226; *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 587-589 (1980). Petitioner identifies no decision suggesting that the possibility of more concise phrasing amounts to surplusage.

In any event, even if some interpretive canon counseled in favor of reading Section 1369(b)(1)(E) as reaching only effluent limitations and "limitations directly related to effluent limitations" (Pet. Br. 30), a rule setting the geographic scope of effluent limitations falls squarely within the latter category. Indeed, such a rule bears a closer connection to effluent limitations than many of the limitations that petitioner concedes are reviewable under Section 1369(b)(1)(E). See *id.* at 31 (offering as examples of purportedly effluent-like rules

those regulations "that direct the point source to engage in specific types of activity" or that "promulgate a design, equipment, management practice, or operational standard") (brackets and citations omitted).

Petitioner is also wrong in contending (Br. 32-33) that the Clean Water Rule does not impose effluent or other limitations "under Section 1311." Petitioner observes that the term "waters of the United States" does not appear in Section 1311. Pet. Br. 32; see State Resps. Br. 23-24; Waterkeeper Resps. Br. 14-15. But "waters of the United States" is part of the definition of a term that does appear in Section 1311. See 33 U.S.C. 1311 (forbidding "discharge of any pollutant" except under specified conditions); 33 U.S.C. 1362(12) (defining "discharge of a pollutant" as adding "any pollutant to navigable waters from any point source"); 33 U.S.C. 1362(7) (defining "navigable waters" to include "waters of the United States"). By establishing the scope of the Section 1311 term "discharge of any pollutant," the Clean Water Rule's legal and practical effect is to make effluent and other limitations under Section 1311 applicable to the waters that the Rule covers. Nothing in Section 1369(b)(1)(E) suggests that the proper forum for judicial review depends on whether the agency achieves this result by issuing a regulatory definition of the term "waters of the United States," or by promulgating a parallel rule that achieves the same result by defining the geographic scope of the Section 1311 phrase "discharge of any pollutant."

Petitioner also contends (Br. 34) that the Clean Water Rule does not impose effluent or other limitations "'under section 1311, 1312, 1316, or 1345' because it is a definitional rule that 'applies across the entire Act'" (citations omitted). Section 1369(b)(1)(E) is not rendered

inapplicable, however, simply because the Clean Water Rule affects the implementation of CWA provisions *in addition to* those enumerated in Section 1369(b)(1)(E) itself. The Clean Water Rule imposes limitations under Section 1311, even if it imposes limitations under other CWA provisions as well.

Petitioner and respondents in support of petitioner suggest (Pet. Br. 32-33, 37-38; State Resps. Br. 38-39, 44-45; Waterkeeper Resps. Br. 40-41; Utility Resp. Br. 20-21) that, if the limitations they would read into Subparagraph (E) are not imposed, "[n]early any EPA action" would be reviewable under Section 1369(b)(1)(E). Pet. Br. 37. That is incorrect. Many EPA actions are not reviewable under Section 1369(b)(1)(E) because they do not impose effluent or other limitations under Section 1311 or under any of the three other enumerated CWA provisions. For example, Subparagraph (E) does not authorize court of appeals review of EPA rules governing hazardous substances, 33 U.S.C. 1321 (2012 & Supp. II 2014); vessel wastes, 33 U.S.C. 1322(b); or construction grants, 33 U.S.C. 1281-1301 (2012 & Supp. II 2014). See *NRDC, Inc.* v. *U.S. EPA*, 673 F.2d 400, 404 n.14 (D.C. Cir.) (noting government's submission that these classes of action were not reviewable under Subparagraph (E)), cert. denied, 459 U.S. 879 (1982). It does not reach EPA decisions approving States' individual control strategies. See *Lake Cumberland Trust, Inc.* v. *United States EPA*, 954 F.2d 1218, 1221, 1223 (6th Cir. 1992) (collecting cases); see also 33 U.S.C. 1314(*l*). It does not reach EPA's decisions approving state water-quality standards. See, *e.g.*, *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513, 517-518 (2d Cir. 1976). And, contrary to petitioner's suggestion (Br. 37-38), it does not reach EPA administrative enforcement orders

under Section 1319(a)(1), such as the order at issue in *Sackett* v. *EPA*, 566 U.S. 120 (2012). While EPA might issue an enforcement order if it concluded that a landowner was violating Section 1311 (or another provision of the CWA), an enforcement order does not itself approve or promulgate effluent or other limitations under Section 1311 or any of the other provisions listed in Subparagraph (E). Giving Subparagraph (E) the scope that its text commands thus does not render the provision limitless. See *NRDC*, 673 F.2d at 404 n.14 (rejecting the same argument).

2. The Clean Water Rule is also reviewable under Section 1369(b)(1)(F)

Section 1369(b)(1)(F) authorizes court of appeals review of EPA action "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F). In *Crown Simpson*, *supra*, this Court considered whether Section 1369(b)(1)(F) authorized direct court of appeals review of EPA's veto of an NPDES permit issued by a state authority. See 445 U.S. at 196. The court of appeals had concluded that it lacked jurisdiction because "EPA's veto of a state-issued permit did not constitute 'issuing or denying' a permit." *Ibid.* The concurring judge on that court, by contrast, expressed the view that reading Section 1369(b)(1)(F) to encompass actions that are "functionally similar" to denial of a permit "best comport[s] with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." *Ibid.*

This Court summarily reversed, "agree[ing] with the concurring opinion" in the court of appeals. *Crown Simpson*, 445 U.S. at 196. It held that Section 1369(b)(1)(F) conferred jurisdiction over the veto, which had "the pre-

cise effect" of a permit denial. *Ibid.* The Court reasoned that a contrary approach "would likely cause delays in resolving disputes under the Act" and would create "a seemingly irrational bifurcated system" in which "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-197.

Under the functional interpretive approach utilized by this Court in *Crown Simpson*, the Clean Water Rule is reviewable under Section 1369(b)(1)(F). An NPDES permit may be issued only for activity that involves a discharge of pollutants to "waters of the United States," 33 U.S.C. 1342, 1362(7) and (12). A rule governing whether particular bodies of water constitute "waters of the United States" therefore controls whether permits may or may not be issued for discharges to those bodies of water. And because permits are required only for discharges to waters of the United States, petitioner's narrow construction of Section 1369(b)(1)(F) would result in the "seemingly irrational bifurcated system" of review that the *Crown Simpson* Court construed the statute to avoid. 445 U.S. at 197. A challenge to an EPA determination that a particular site contains "waters of the United States" would be reviewable directly in a court of appeals under Section 1369(b)(1)(F) if that determination was made in an individual NPDES permitting decision. But EPA's resolution of the same question on a more categorical basis through the Clean Water Rule would instead be reviewed through suits brought under the APA and filed in district courts across the country.

Because that approach is contrary to the principles in *Crown Simpson*, courts of appeals have generally construed Section 1369(b)(1)(F) to cover rules that delineate EPA's jurisdiction to issue permits. See *National Cotton Council* v. *United States EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (rule providing that pesticides applied in accordance with a federal statute are exempt from permitting requirements), cert. denied, 559 U.S. 936 and 130 S. Ct. 1505 (2010); *NRDC, Inc.* v. *United States EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992) (rule specifying what types of stormwater discharges require permits); *American Mining Cong.* v. *United States EPA*, 965 F.2d 759, 763 (9th Cir. 1992) (rule requiring permits for certain stormwater discharges); *NRDC, Inc.* v. *U.S. EPA*, 656 F.2d 768, 775-776 (D.C. Cir. 1981) (rule governing whether the agency may grant permits with certain types of variances); see also, *e.g.*, *National Pork Producers Council* v. *United States EPA*, 635 F.3d 738, 749-751 (5th Cir. 2011); but see *Friends of the Everglades* v. *United States EPA*, 699 F.3d 1280, 1287-1288 (11th Cir. 2012) (holding that court of appeals lacked jurisdiction under Subparagraph (F) to consider a rule providing that no NPDES permit was required for certain transfers of water from one body to another), cert. denied, 134 S. Ct. 421 and 134 S. Ct. 422 (2013).

Petitioner's contrary arguments lack merit. Petitioner seeks (Br. 24) to confine *Crown Simpson* to its facts, asserting that the Court "merely held that EPA's veto of a state-issued permit is the denial of a Section 1342 permit covered by Subsection (F)." But *Crown Simpson*'s holding consists not only of its "result," but also of its "rationale." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66-67 (1996) (compiling authority).

Petitioner's argument disregards *Crown Simpson*'s reasoning, including the Court's conclusion that Subparagraph (F) reaches decisions that are "functionally similar" to permit issuance or denial and its rejection of "a seemingly irrational bifurcated system" under which decisions that are functional equivalents would be routed to different courts. 445 U.S. at 196, 197. Particularly in light of the "special force" of stare decisis "in the area of statutory interpretation," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989), and the "influential decisions" of the courts of appeals (Pet. Br. 39) that have long relied on this Court's guidance concerning Subparagraph (F), there is no sound reason to abrogate the *Crown Simpson* framework.

Petitioner also argues that the canon against superfluity provides a ground to overturn the *Crown Simpson* approach. See Pet. Br. 25-27; see also State Resps. Br. 36-38. That argument rests on petitioner's view that, if Subparagraph (F) of Section 1369(b)(1) encompasses the Clean Water Rule, it must likewise encompass the categories of EPA action that are enumerated in Section 1369(b)(1)'s other subparagraphs. See Pet. Br. 25-26 (stating that, "[u]nder [Judge McKeague's] approach, most of the other designations Congress made in Section 1369(b) would be unnecessary because they would be covered by Subsection (F)"). That argument lacks merit.

A construction of Section 1369(b)(1)(F) that reaches decisions functionally similar to permit grants or denials naturally reaches rules that govern whether EPA has jurisdiction to issue or deny a permit. But it does not clearly reach "standard[s] of performance," "pretreatment standard[s]," "effluent limitation[s]," and "individual control strateg[ies]" for toxic pollutants—

the types of EPA action that Congress made reviewable in 33 U.S.C. 1369(b)(1)(A), (C), (E), and (G). Those rules set standards that EPA and state authorities must also incorporate in their permits, see 33 U.S.C. 1317(d), but they do not dictate whether a permit may be issued at all. EPA's decision whether to authorize a State's permitting program under 33 U.S.C. 1369(b)(1)(D) is likewise entirely distinct from a decision whether to issue or deny a permit for a particular discharge of pollutants. Thus, even if Subparagraph (F) arguably encompasses some of the EPA actions enumerated in Section 1369(b)(1)'s other subparagraphs, those provisions serve a useful purpose by "remov[ing] any doubt" that courts of appeals have jurisdiction to review those actions. *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 383-384 (2013) (explaining that provisions are not superfluous when they remove doubt about an issue); *Ali*, 552 U.S. at 226 (same).

In any event, "[t]he canon against surplusage is not an absolute rule," *Marx*, 568 U.S. at 385, because "[r]edundancies across statutes are not unusual events in drafting," *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992); see Scalia & Garner 176-177. Given the complexity of the CWA, the interconnectedness of its provisions, and the many classes of decisions that Congress routed to the court of appeals under Section 1369(b)(1), significant overlap among the categories of actions covered by Section 1369(b)(1) would hardly be surprising. Petitioner identifies no persuasive reason to depart from the pragmatic approach to Subparagraph (F) that this Court adopted decades ago in *Crown Simpson* and that has shaped lower-court case law since that time.

B. Petitioner's Reading Of Section 1369(b)(1) Cannot Be Reconciled With The Provision's Structure And Purpose

By routing cases directly to the courts of appeals, and by requiring that any challenge to the enumerated EPA actions must be brought within 120 days, Section 1369(b)(1) facilitates quick and orderly resolution of disputes concerning the legality of important rules governing the scope of a regulatory scheme. See *Harrison*, 446 U.S. at 593 ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal."); *Crown Simpson*, 445 U.S. at 196, 197 (agreeing that Section 1369(b) serves "the congressional goal of ensuring prompt resolution of challenges to EPA's actions," and rejecting an interpretation that "would likely cause delays in resolving disputes under the Act"). In addition, as then-Judge Ginsburg explained, "initial review in a court of appeals" helps to produce "[n]ational uniformity, an important goal in dealing with broad regulations." *NRDC*, 673 F.2d at 405 n.15; see *Virginia Elec. & Power Co.* v. *Costle*, 566 F.2d 446, 451 (4th Cir. 1977) (*VEPCO*) (observing that "the jurisdictional scheme of the Act * * * in general leaves review of standards of nationwide applicability to the courts of appeals, thus furthering the aim of Congress to achieve nationally uniform standards").

In each of its decisions interpreting Section 1369(b)(1), this Court has construed the provision to afford this form of expedited review to a coherent class of EPA actions, so that intertwined agency actions are routed through the same channels. The petitioners in *E.I. du Pont* argued that Section 1369(b)(1) should be interpreted to permit direct court of appeals review of

grants and denials of individual variance permits under Section 1311, but not of "effluent limitations for classes and categories of existing point sources." 430 U.S. at 136. In rejecting that approach, the Court explained that the petitioners' reading of the jurisdictional provision "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.* And in resolving a different question concerning EPA's statutory authority "to issue regulations establishing effluent limitations for classes of plants," *id.* at 124, the Court explained that it would be "highly anomalous" if the agency's new-source regulations "were directly reviewable in the Court of Appeals," *id.* at 127-128, while its existing-source standards "based on the same administrative record were reviewable only in the District Court," *id.* at 128. The Court stated that "[t]he magnitude and highly technical character of the administrative record involved with these regulations makes it almost inconceivable that Congress would have required duplicate review in the first instance by different courts." *Ibid.*

Two years later, the Court in *Crown Simpson* again construed Section 1369(b)(1) to avoid irrational disparities in the review of similar agency actions. The Court's holding that Section 1369(b)(1)(F) should be interpreted to reach not only EPA's own issuance or denial of a permit, but also the "functionally similar" step of vetoing a state permit, rested on that point. 445 U.S. at 196. The Court explained that the court of appeals' contrary approach was flawed because it would mean that "fortuitous circumstance[s]"—there, whether a State

had been authorized to issue NPDES permits—would control the "level[] of the federal-court system" at which comparable actions were reviewed. *Id.* at 196-197. The Court also noted that "the additional level of judicial review" that would occur in the district courts "would likely cause delays in resolving disputes under the Act." *Id.* at 197. The Court concluded that, "[a]bsent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system." *Ibid.*[5]

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[5] In other statutory contexts as well, this Court has read comparable jurisdictional provisions to avoid bifurcated review of related agency actions. In *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768 (1985), the Court held that a provision channeling certain Merit Systems Protection Board decisions to the Federal Circuit should be interpreted to encompass claims of retirees as well as those of active employees because the interests favoring direct court of appeals review were equally present for both classes of cases. See *id.* at 796. The Court concluded that the jurisdictional provision reflected the intent "to abolish the needless practice of reviewing civil service actions on the same criteria at two judicial levels." *Id.* at 798. In light of that congressional policy choice, the Court saw no reason why Congress would have intended one class of claims—those of retirees—to "be reviewed for legal and procedural error first by the Claims Court or a district court, and then all over again by the Federal Circuit." *Ibid.* Citing *Crown Simpson*, the Court stated that it "cannot assume that Congress intended to create such a bizarre jurisdictional patchwork." *Id.* at 799; see *id.* at 799 n.37. The Court has relied on the same principle in construing the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 742 (1985) (avoiding "a seemingly irrational bifurcated system" in which "some final orders in licensing proceedings [would] receiv[e] two layers of judicial review and some receiv[e] only one") (citation omitted), and the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, *Foti* v. *Immigration & Naturalization Serv.*, 375 U.S. 217, 232 (1963) (construing statute to avoid "[b]ifurcation of judicial review of deportation proceedings").

Petitioner's reading of Section 1369(b)(1)(E) and (F) would create the type of irrational bifurcation that the Court in *E.I. du Pont* and *Crown Simpson* sought to avoid. Petitioner would construe Section 1369(b)(1) as vesting the courts of appeals with jurisdiction to review EPA regulations setting numerical or qualitative effluent limitations, while authorizing district courts throughout the country to review regulations governing the same effluent limits' geographic scope. That bifurcation would hinder regulated parties' efforts to obtain prompt clarification of their responsibilities under the CWA. See *Crown Simpson*, 445 U.S. at 196 (noting that Section 1369(b)(1) is designed to facilitate speedy resolution of the meaning of covered provisions); *NRDC*, 673 F.2d at 405 n.15 (Ginsburg, J.) ("National uniformity is an important goal in dealing with broad regulations.").

A similar irrational bifurcation would result from routing to the courts of appeals any "waters of the United States" determinations that could be made in the context of individual permitting decisions, see 33 U.S.C. 1369(b)(1)(F), while sending to the district courts the rules that govern those permitting determinations. See pp. 31-33, *supra*. That division would produce "the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits * * * but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont*, 430 U.S. at 136. "Absent a far clearer expression of congressional intent," Section 1369(b) should not be read "as creating

such a seemingly irrational bifurcated system." *Crown Simpson*, 445 U.S. at 197.[6]

Petitioner makes no meaningful attempt to reconcile its position with the interpretive principles set out in *E.I. du Pont* and *Crown Simpson*. Petitioner offers (Br. 50-55) several policy arguments regarding the value of decentralized litigation, principally emphasizing the "doctrinal dialogue that occurs when a court * * * addresses the legal reasoning of another and reaches a contrary conclusion." Pet. Br. 51 (citation omitted). Those arguments do not explain the bifurcation that petitioner's approach would create. A Congress that placed great weight on doctrinal dialogue might have routed to district courts *all* litigation concerning EPA's administration of the CWA. But petitioner offers no reason why Congress would have distinguished for this purpose between the numerical aspect of effluent limitations and the geographic aspect of those limits.

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[6] The different institutional competencies of trial and appellate courts do not support that bifurcation. The Clean Water Rule—like an effluent limitation—is "[a] broad, policy-oriented rule[]," *NRDC*, 673 F.2d at 405, that is reviewed without reliance on "[t]he factfinding capacity of the district court," *Florida Power & Light Co.*, 470 U.S. at 744. Under petitioner's approach, each district court where suit has been filed—more than ten courts so far (Pet. Br. vi)—would review an administrative record of more than 350,000 pages, 15-3751 C.A. Doc. 122 (Oct. 11, 2016), only to have that inquiry repeated by any court of appeals to which an appeal was taken. See *E.I. du Pont*, 430 U.S. at 128 (considering it "almost inconceivable" that Congress in enacting Section 1369(b)(1) would have intended multiple courts to engage in "duplicate review" of an extensive "and highly technical" administrative record); *Florida Power & Light Co.*, 470 U.S. at 744 (explaining that, when agency action is reviewed on an administrative record, "[p]lacing initial review in the district court * * * ha[s] the negative effect * * * of requiring duplication of the identical task in the district court and in the court of appeals").

Petitioner also suggests that this Court should eschew "functional" considerations altogether (Br. 45), and simply treat Section 1369(b) as sweeping in an "odd or arbitrary" collection of agency actions whose boundaries are "hard to fathom" (Br. 45-46). That proposal is inconsistent with this Court's decisions in *Crown Simpson* and *E.I. du Pont*, which treated functional considerations as an important guide to interpreting Section 1369(b), and which have undergirded decades of decisions in the lower courts. By treating as irrelevant the structural and purposive considerations that courts have heretofore used to resolve ambiguities in Section 1369(b)(1), petitioner's approach would essentially render nugatory that substantial body of case law, and it would hinder judicial efforts to resolve future jurisdictional disputes in a consistent and principled fashion.

C. The CWA's Legislative History Supports The Court Of Appeals' Assertion Of Jurisdiction To Review The Clean Water Rule

1. The House and Senate debates that preceded Section 1369(b)(1)'s enactment reflected an understanding that the provision would generally govern the nationwide rules that EPA promulgated to implement the CWA. Both the House and Senate versions of the bill applied to substantially the same basic list of agency actions—a list that was virtually identical to the list that appeared in Section 1369(b)(1) as enacted in 1972. Compare CWA, Pub. L. No. 92-500, § 509(b)(1), 86 Stat. 892, with H.R. 11896, 92d Cong., 1st Sess. § 509(b) (1971), and S. 2770, 92d Cong., 1st Sess. § 509(b) (1971). The House version would have routed review of the enumerated agency actions to the district courts, while the Senate version would have authorized review of some listed actions by the D.C. Circuit and others by regional courts of

appeals. See *ibid.* In the reconciliation process, Congress settled on an intermediate approach, under which all enumerated EPA actions were made reviewable by the regional circuits. Conference Report 147-148.

The Senate Report stated that Section 1369(b)(1) would authorize expedited, centralized review of the "requirements, standards and regulations" that EPA established under the Act. Senate Report 84-85. It explained that there were "uncertainties" under existing law about the availability of review for "administratively developed and promulgated requirements, standards and regulations," and that Section 1369 would "specifically provide for such review within controlled time periods" in particular appellate courts. *Ibid.* Summarizing the provision, the Senate Report stated that "[a]ny suit against a Federal standard" under the Act would be routed to the D.C. Circuit, while "[s]uits for review of a Section 402 permit" would be filed in "the Court of Appeals for the appropriate circuit." *Id.* at 84.

Although the House version provided for review in district courts, the House Report likewise described proposed Section 1369(b)(1) as establishing a broadly applicable framework for resolution of disputes concerning EPA's implementation of the Act. It stated that, "with the number and complexity of administrative determinations that [the Act] requires[,] there is a need to establish a clear and orderly process for judicial review." House Report 136. It also spoke broadly of Section 1369's relationship to that goal, stating that "Section [1369] will ensure that administrative actions are reviewable, but that the review will not unduly impede enforcement." *Ibid.*

The Conference Report confirmed that Congress understood Section 1369(b)(1) as broadly encompassing

rulemakings that would implement the Act's limitations. It described the Senate version as "requir[ing] that any suit against a Federal standard" would be filed in the D.C. Circuit, subject to the proviso that "[s]uits for review of the Administrator's action in approving or promulgating any effluent limitation under section 301 or 302 or issuing or denying a permit under section 402 of this Act would have to be filed in the Court of Appeals for the appropriate circuit." Conference Report 147. And it described the House version of the provision as "basically the same * * * except that review of any of the Administrator's actions" would be conducted by district courts. *Ibid.* The Conference Report explained that the conference version was "the same as the Senate bill and the House amendment" except that, as relevant here, "[j]udicial review is to be had in the circuit court of appeals for the judicial district in which the interested person resides or transacts business, and the time for application for judicial review is extended from 30 to 90 days." *Id.* at 147-148. The pertinent legislative Reports all reflect an understanding of the judicial-review provision that is not compatible with petitioner's view, under which the statute would provide for appellate review of an "odd or arbitrary" (Pet. Br. 46) selection of agency determinations, but not of closely related determinations that play an equally integral role in implementing the CWA.

To be sure, insofar as the Senate and Conference Reports suggested that Section 1369(b)(1) encompasses *every* nationwide regulation that the Administrator issues under the CWA, their language was imprecise. Subparagraphs (E) and (F) of Section 1369(b)(1) are naturally read to cover regulations that construe and implement the Act's prohibition on unauthorized

pollutant discharges and its attendant NPDES permitting program—the centerpieces of the Act. See, *e.g.*, *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981); *NRDC, Inc.* v. *U.S. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). But Section 1369(b)(1) does not authorize court of appeals review of EPA regulations that implement some more peripheral CWA provisions, such as research programs, 33 U.S.C. 1251-1275 (2012 & Supp. III 2015); the funding of treatment facilities, 33 U.S.C. 1281-1301 (2012 & Supp. II 2014); and grants to the States, 33 U.S.C. 1381-1387 (2012 & Supp. II 2014).

The fact that the legislative Reports used imprecise language, however, does not render them irrelevant to the interpretive question presented here. A judicial-review provision that excluded the Clean Water Rule, which defines the geographic reach of the CWA's core provisions and thus of the NPDES permitting scheme, could not even loosely be described as covering the "requirements, standards and regulations" that EPA establishes under the Act, Senate Report 84-85, or as conferring appellate jurisdiction over "any suit against a Federal standard," Conference Report 147. Nor can petitioner's view of the statute as dividing review of intertwined regulatory provisions between different levels of the judicial system be reconciled with Congress's stated objective of establishing "a clear and orderly process for judicial review" that was necessary in light of "the number and complexity of administrative determinations that [the Act] requires." House Report 136.

2. The courts of appeals have understood this Court's decisions in *Crown Simpson* and *E.I. du Pont* as giving "a practical rather than a cramped construction" to Section 1369(b)(1), and they have largely

applied the same functional analysis in resolving ambiguities in that judicial-review provision. *NRDC*, 673 F.2d at 405; see *VEPCO*, 566 F.2d at 450; Pet. Br. 39; pp. 31-32, *supra*. In 1987, Congress amended Section 1369(b)(1) without narrowing its scope. See Water Quality Act of 1987, Pub. L. No. 100-4, Tits. III-V, §§ 308(b), 406(d)(3), 505(a) and (b), 101 Stat. 39, 73, 75-76.[7] The fact that Congress amended Section 1369(b)(1) after the framework of *Crown Simpson* and *E.I. du Pont* was in place, while giving no indication that it disapproved either the functional approach generally or its specific application to rules that govern the CWA permitting process, provides an additional justification for adhering to that framework. See, *e.g.*, *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009).

3. Petitioner relies in part (Br. 42-43) on Congress's decision not to enact a 1977 proposal to centralize review under Section 1369(b)(1) in the D.C. Circuit. In fact, the debates over that proposal confirm Congress's understanding that Section 1369(b)(1) authorizes court of appeals review of nationwide regulations, like the Clean Water Rule, that govern the scope of effluent and other limitations under the Act.

Petitioner relies (Br. 42) on the Senate's rejection of a floor amendment introduced by Senator Kennedy,

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[7] The 1987 amendments to Section 1369(b)(1) made additional EPA actions reviewable in the courts of appeals. Congress also added a new venue-selection procedure to Section 1369(b) to address situations in which challenges to an agency action were brought in multiple courts of appeals. Water Quality Act of 1987, Pub. L. No. 100-4, Tits. III-V, §§ 308(b), 406(d)(3), 505(a) and (b), 101 Stat. 39, 73, 75-76.

which sought to implement a proposal of the Administrative Conference of the United States to centralize review of nationwide CWA regulations in the D.C. Circuit. 41 Fed. Reg. 56,767 (Dec. 30, 1976); see 123 Cong. Rec. 26,756 (1977) (statement of Sen. Kennedy); *id.* at 26,760-26,761 (same). The Administrative Conference explained that its proposal would move review of nationwide standards to the D.C. Circuit *from the regional circuits*—not from the district courts. 41 Fed. Reg. at 56,767. Thus, the Administrative Conference described Section 1369(b) as "provid[ing] that all standards promulgated under [the CWA] by the Environmental Protection Agency, including national standards, are to be reviewed in the United States Court of Appeals for a circuit in which the petitioner resides or transacts business." *Ibid.* The Administrative Conference recommended that "[a]ll national standards under the [CWA]" should instead be reviewed in the D.C. Circuit, while "all other regulations, standards, and determinations that are reviewable in the court of appeals under the [CWA] should be in the circuit containing the affected state or facility." *Ibid.*[8]

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[8] The Administrative Conference also described the statute as containing provisions that were "ambiguous," and recommended that Section 1369(b) be amended to specifically mention several additional types of EPA actions in order to "make clear that [they] are reviewable in the courts of appeals." 41 Fed. Reg. at 56,767-56,768 (addressing "[p]romulgation or approval of water-quality standards under Section 303," "[p]romulgation of effluent guidelines under section 304," "[p]romulgation of regulations governing the discharge of oil or hazardous substances under section 311(b)," and "[p]romulgation of standards for marine sanitation devices under Section 312 or determinations that a state may completely prohibit the discharge from all vessels of any sewage under Section 312(f)").

With respect to the proper forum for reviewing nationwide EPA regulations governing the scope of the CWA's coverage, the debate concerning the proposed amendment reflected the participating Senators' understanding that the choice before them was not between circuit and district courts, but between the D.C. Circuit and the regional courts of appeals. Senator Kennedy described his proposal as one that would "centralize judicial review of national regulations" in the D.C. Circuit, because in the absence of such centralization, "[t]he EPA has been forced to repeatedly litigate the same issues in different circuits." 123 Cong. Rec. at 26,754-26,755; see *id.* at 26,757 ("[W]hat we are having is a proliferation of different cases in different circuits around the country."). Opponents of the amendment argued that EPA's nationwide regulations should be reviewed in the regional courts of appeals. *Id.* at 26,758 (statement of Sen. Scott) ("[S]omeone who is affected by a rule that has been made by the administrator should not have to come to Washington to be heard on the matter. We have our various judicial circuits, and I think that is one of the reasons for having our circuits. * * * [Y]ou should be able to go to the circuit court within your own circuit in all instances."); *id.* at 26,760 (statement of Sen. Stafford) ("I agree with the argument that this is not the time to take another step in dismembering the U.S. circuit courts of appeal[s] in this country by bringing another matter to Washington for exclusive determination."); see also *ibid.* (statement of Sen. Randolph); *id.* at 26,759 (statement of Sen. Thurmond).

Indeed, even the lone floor statement that petitioner invokes (see Br. 42-43) reflects the understanding that nationwide regulations like the Clean Water Rule would

generally be reviewed in the circuit courts. Senator Domenici began with a general statement—quoted in part by petitioner (*ibid.*)—that Congress should not "in bits and pieces, decide that the circuit court system in this country has no validity," including through such steps as abolishing the circuit courts entirely, or "nickel and dim[ing] the district courts of the United States out of business." 123 Cong. Rec. at 26,759. But when he turned to the bill at hand, Senator Domenici made plain that he also regarded the question before the Senate to be whether nationwide CWA regulations like the Clean Water Rule should be reviewed in regional circuits or in the D.C. Circuit. Thus, Senator Domenici stated that EPA's support for the proposed legislation reflected that the federal government did "not like how the circuit courts have ruled on matters of national interest." *Ibid.* He expressed the view that "[t]hese cases should be heard in the circuit courts," and that "there is just as much justification to let it be the circuit court that has California or look at the cases that have been filed and see where most of the constituents come from and choose the one that has had the most cases, and say that circuit will have it." *Ibid.* No Senator argued, as a ground for opposing Senator Kennedy's amendment, that review of such nationwide regulations should occur in the district courts.

In sum, from Section 1369(b)(1)'s enactment onward, Congress has understood that the provision would sweep broadly. That history provides additional reason that Subparagraph (E) should be given its full textual sweep, applying to any rule that promulgates any limitation under Section 1311. And it provides additional reason that Subparagraph (F) should be construed pragmatically, in accord with this Court's approach in

Crown Simpson, to reach rules that control whether EPA may issue an NPDES permit at all.

D. When Congress Has Authorized Direct Court Of Appeals Review Of Federal Agency Action, Ambiguities As To The Scope Of That Authorization Should Be Resolved In Favor Of Broader Coverage

In *Florida Power & Light Co.*, this Court addressed the question whether statutory provisions authorizing direct court of appeals review of certain Nuclear Regulatory Commission (NRC) decisions encompassed a particular type of order. See 470 U.S. 729, 731, 734-735 (1985). The Court explained that, when such a direct-review provision exists, "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts," this Court "will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Id.* at 745. Courts of appeals have accordingly held that, "when there is a specific statutory grant of jurisdiction to the courts of appeals, it should be construed in favor of review by the court of appeals." *NRDC* v. *Abraham*, 355 F.3d 179, 193 (2d Cir. 2004); see, *e.g.*, *General Elec. Uranium Mgmt. Corp.* v. *United States Dep't of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985) ("[I]t frequently has been noted that, in administrative appeals, 'where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter.'") (citation omitted); 33 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure: Judicial Review of Administrative Action* § 8292 (2006).

Petitioner and respondents in support of petitioner (Pet. Br. 48-50; State Resps. Br. 43-44, 47; Agrowstar Resps. Br. 6; Waterkeeper Resps. Br. 18, 27, 36) argue

that Section 1369(b)(1) should instead be construed narrowly to avoid due-process or rule-of-lenity concerns. They emphasize the CWA's directive that "[a]ction of the Administrator with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2). They argue that Section 1369(b)(1) should be construed narrowly so as to reduce the range of challenges that defendants in enforcement proceedings will be barred from asserting.

This potential effect on future (hypothetical) enforcement proceedings does not justify narrowing Section 1369(b)(1). See *Harrison*, 446 U.S. at 592 n.9 (rejecting parallel argument for narrow construction of the provision for review of agency action in the courts of appeals in the Clean Air Act, 42 U.S.C. 7401 *et seq.*). In and of itself, direct court of appeals review of the Clean Water Rule raises no conceivable due-process or rule-of-lenity concern. Any such concern will arise, if at all, only if and when the defendant in a future enforcement proceeding argues that he cannot properly be denied the opportunity to challenge an EPA rule on which the enforcement action is based. As in *Harrison*, this Court should give Section 1369(b)(1) the meaning that follows from the statute's text, structure, and purposes, and leave the preclusion challenge of a possible future defendant to "await another day." 446 U.S. at 593 n.9.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KEVIN S. MINOLI
Acting General Counsel
KARYN I. WENDELOWSKI
Attorney
United States Environmental Protection Agency

EARL G. MATTHEWS
Acting General Counsel
CRAIG R. SCHMAUDER
Deputy General Counsel
Department of the Army

DAVID COOPER
Chief Counsel
DANIEL INKELAS
Attorney
United States Army Corps of Engineers

JEFFREY B. WALL
Acting Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
DANIEL R. DERTKE
AMY J. DONA
ANDREW J. DOYLE
J. DAVID GUNTER II
ROBERT J. LUNDMAN
MARTHA C. MANN
JESSICA O'DONNELL
Attorneys

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APPENDIX

1. 33 U.S.C. 1369(b) provides in pertinent part:

Administrative procedure and judicial review

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to

judicial review in any civil or criminal proceeding for enforcement.

* * * * *

2. 33 U.S.C. 1311 provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is

technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97-117, §21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph—

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water

supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and

if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection,

where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of

73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of

this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source;

and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later that[1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g)

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[1] So in original. Probably should be "than".

of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) COMPLIANCE REQUIREMENTS UNDER SUBSECTION (g).—

(A) EFFECT OF FILING.—An application for a modification under subsection (g) of this section and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) EFFECT OF DISAPPROVAL.—Disapproval of an application for a modification under subsection (g) of this section shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) DEADLINE FOR SUBSECTION (g) DECISION.—An application for a modification with respect to a pollutant filed under subsection (g) of this section must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) EXTENSION OF APPLICATION DEADLINE.—

(A) IN GENERAL.—In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of this section of the requirements of subsection (b)(1)(B) of this section with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) APPLICATION.—An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will—

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) ADDITIONAL CONDITIONS.—The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) PRELIMINARY DECISION DEADLINE.—The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for

significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(*l*) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this sub-

section by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) of this section and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

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[2] So in original. Probably should be "contractual".

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application

for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) of this section or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limi-

tation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) **Reports**

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(*o*) **Application fees**

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No

discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection—

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

3. 33 U.S.C. 1342(a) provides:

National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this

title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

4. 33 U.S.C. 1362 provides in pertinent part:

Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

5. 33 C.F.R. 328.3, as amended by the Clean Water Rule, provides:

Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this sec-

tion. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) *Definitions.* In this section, the following definitions apply:

(1) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring.* The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a

tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the

nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

(i) Sediment trapping,

(ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding,

spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(d) The term *tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water

surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

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No. 16-299

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IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

DEPARTMENT OF DEFENSE, et al.

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

BRIEF OF RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL AND NATIONAL WILDLIFE FEDERATION SUPPORTING AFFIRMANCE

Catherine Marlantes Rahm
Jennifer A. Sorenson
Jon P. Devine, Jr.
NATURAL RESOURCES
DEFENSE COUNCIL
40 W. 20th St.
New York, NY 10011
(212) 727-2700

Eric F. Citron
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Court of Appeals has original jurisdiction under 33 U.S.C. §1369(b)(1) over a petition for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act.

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BRIEF OF RESPONDENTS

Respondents Natural Resources Defense Council (NRDC) and National Wildlife Federation (NWF) agree with the judgment below and the result urged by the federal respondents. The simplest resolution of this matter is to recognize that if a Clean Water Act rule enacted by the Administrator has the effect of approving effluent or other limitations on regulated parties under 33 U.S.C. §1311, then challenges to such a rule must be brought in the courts of appeals under 33 U.S.C. §1369(b)(1)(E). The Clean Water Rule at issue here qualifies: In enacting the Rule, the Administrator approved effluent limitations and other limitations on dischargers by specifying where the limitation in section 1311(a)—prohibiting *any* discharges except as in compliance with the Act—shall apply. *See Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015). Accordingly, challenges to the Clean Water Rule must be brought in the courts of appeals, and this Court should affirm.

This result follows directly from section 1369 and this Court's precedents, which have analyzed the practical "effect[s] of [the agency's] action" rather than attaching a formalistic label to the relevant rule. *See Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97 (1980) (per curiam); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977); *see also NRDC v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982) (Ginsburg, J.) (explaining that section 1369 should be given a "practical rather than a cramped construction"). Because these points are elucidated in the decision below and similar positions are likely to be addressed at length in the government's briefing,

however, we try not to repeat such arguments in detail here.

Instead, this brief addresses a key flaw in petitioner's attempt to obscure the applicability of section 1369(b)(1) by describing the Clean Water Rule as devoid of "limitations." That framing of the Rule raises justiciability concerns, as it calls into question petitioner's standing to challenge the Rule in its separate district court action under the Administrative Procedure Act. If, as petitioner says, the Rule "does not establish any regulatory requirements," "imposes no enforceable duty" on its members, and is "not a 'limitation' in any ordinary sense of the word," Pet. Br. 28-29 (quoting, in part, 80 Fed. Reg. 37,054, 37,102), then petitioner has no (1) standing to bring (2) a ripe challenge to (3) final agency action under the APA. As we will explain, if petitioner's district court challenge to the Rule were not justiciable, then petitioner would also lack standing to maintain its petition for certiorari. That means, in turn, that this Court cannot accept petitioner's premise about the effects of the Clean Water Rule and still have its own jurisdiction to grant petitioner the judgment it seeks.

Ultimately, justiciability issues pose no obstacle to the Court's review, however. The Rule has immediate effects on petitioner and other parties, as petitioner itself alleged in its district court action. Petitioner told the district court that it has standing to challenge the Rule on behalf of its members because "the Rule *requires* members of the Plaintiffs either to alter their activities to *avoid discharges* ... or to *obtain permits* when previously they would not have had to." *See* S.D. Tex. No. 15-cv-165, Dkt. 1

(Complaint filed July 2, 2015) ("Tex. Compl.") at 14, ¶38 (emphasis added). Likewise, the only injury petitioner seeks to redress through vacatur of the Rule is the Rule's imposition of these *limitations* on what petitioner's members can do with respect to water bodies the Rule identifies as "waters of the United States." *See id.*

An honest examination of the Clean Water Rule's impacts shows that it is an agency action approving limitations on regulated parties—indeed, that is the *whole reason* petitioner wants to challenge it. Petitioner obscures that reality only by failing to concretize—at least in this proceeding—the injuries it believes the Rule causes. Discussing these issues helps clear away the confusion created by petitioner's brief. And once that is done, the application of section 1369(b)(1) to this case is straightforward.

STATEMENT OF THE CASE

I. The Clean Water Act

Congress enacted the Clean Water Act in 1972 to restore and protect the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The Act applies a suite of pollution-control and cleanup measures to "navigable waters," which Congress defined as "the waters of the United States." *Id.* §1362(7). Congress recognized that these protections would not achieve the Act's goals if applied only to navigable-in-fact and interstate waters. Congress thus defined "navigable waters" broadly; the Senate Conference Report stated that the conferees intended "navigable waters" to be given "the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, at 144 (1972).

The Act's core protection against water pollution limits "the discharge of any pollutant by any person" by prohibiting such discharges "[e]xcept as in compliance with this section and section 1312, 1316, 1317, 1328, 1342, and 1344 of this title." 33 U.S.C. §1311(a). Congress applied this protection to "waters of the United States" by defining "discharge of a pollutant" to include "any addition of any pollutant to navigable waters." *Id.* §1362(12). This is the engine that drives the Act. For example, section 1311(a) prohibits many discharges into waters of the United States absent a National pollutant discharge elimination system (NPDES) permit under section 1342. And an NPDES permit in turn must incorporate limitations that appear throughout the Clean Water Act and EPA regulations regarding effluents, toxic pollutants, water quality standards, industry-specific control technologies, and the like. *See, e.g.*, 40 C.F.R. pt. 122, subpart C; 40 C.F.R. §122.44 (requiring in particular that NPDES permits contain applicable effluent limitations). Thus, many limitations, including effluent limitations, are applied to parties only through the limitation in section 1311(a) and the NPDES permitting process.

EPA issued rules in 1973 covering a wide range of waters as "waters of the United States," including many that were not navigable-in-fact. 38 Fed. Reg. 13,528, 13,529 (May 22, 1973). By 1982, both EPA and the Army Corps of Engineers had issued regulations defining "waters of the United States," and these remained largely unchanged until the agencies adopted the Clean Water Rule in 2015. Those previous regulations covered navigable-in-fact waters, interstate waters, the territorial seas,

impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and all other waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." 40 C.F.R. §122.3 (1981), 45 Fed. Reg. 33,290, 33,424 (May 19, 1980); *see also* 33 C.F.R. §323.2 (1983), 47 Fed. Reg. 31,794, 31,810 (July 22, 1982).

In 1985, this Court endorsed a broad reading of the phrase "waters of the United States," unanimously upholding the Corps' application of the Act to adjacent wetlands. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985). The Court observed that excluding wetlands from the definition of "waters of the United States" would not do justice to "the realities of the problem of water pollution that the Clean Water Act was intended to combat." *Id.* at 132.

In the early 2000s, this Court rendered two additional decisions considering the extent of the Clean Water Act. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Court ruled that the agencies' "Migratory Bird Rule," which interpreted the agencies' regulations to protect waters used by migratory birds, was not authorized under the Act when applied to "an abandoned sand and gravel pit." 531 U.S. 159, 162, 164, 174 (2001). In *Rapanos v. United States*, the Court remanded for further review the Corps' application of the Act to four wetlands lying "near ditches or man-made drains that eventually empty into traditional navigable waters." 547 U.S. 715, 729, 757 (2006). *Rapanos* produced no majority opinion: A four-Justice plurality proposed

one test for determining whether a water body is a "water of the United States," *id.* at 742; Justice Kennedy, concurring in the judgment, proposed another, *id.* at 779; and four dissenting Justices would have left the agencies' definition in place, but would at a minimum have upheld protection for waters satisfying either the plurality's or Justice Kennedy's test, *id.* at 810 (Stevens, J., dissenting).

Although *SWANCC* and *Rapanos* did not invalidate any agency regulation, they raised questions about the proper scope of the Act and those regulations. Subsequently, the agencies retreated from enforcing the regulations as written. They implemented informal policies—not compelled by this Court's decisions—that made it difficult to apply the Act's protections to certain waters that should have been covered. Numerous parties urged the agencies to revise their regulations and provide clarity. *See* 80 Fed. Reg. at 37,056-57; *see also Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (noting that the agencies could have avoided the unfortunate effects of the Court's splintered opinion had they developed regulations defining "an outer bound" to their authority).

II. The Clean Water Rule

Accordingly, in 2011, the agencies initiated a rulemaking process to amend their regulations. The agencies identified Justice Kennedy's opinion in *Rapanos*, which concluded that the Act protects wetlands that have a "significant nexus" to waters traditionally considered navigable, *id.* at 759, 779, 787 (Kennedy, J., concurring in the judgment), as the "key" to their interpretation of the Act. *See* 80 Fed.

Reg. at 37,060. The Rule provides that "[w]aters are 'waters of the United States' if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." *Id.*

In support of the rulemaking, EPA's Office of Research and Development prepared a report (the Science Report) that synthesized the published, peer-reviewed scientific literature discussing the physical, chemical, and biological connectivity between various kinds of streams, wetlands, and other waters, and downstream water bodies. EPA-HQ-OW-2011-0880-20859.[1] The Science Report provides the scientific foundation for much of the final rule. *See* 80 Fed. Reg. at 37,057, 37,065.

The agencies proposed a rule on April 21, 2014, *see* 79 Fed. Reg. 22,188, and received over a million public comments. EPA-HQ-OW-2011-0880-20872 (Response to Comments). They ultimately issued the final Clean Water Rule on June 29, 2015. It divides waters into three groups: (1) waters that are categorically "waters of the United States"; (2) waters

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[1] The filing of the joint appendix was deferred in the case below (6th Cir. No. 15-3751, Dkt. 99-1), and briefing was stayed before the appendix was compiled. The record documents for the Rule are housed on the government's "regulations.gov" website, and a document can be found there by searching for EPA-HQ-OW-2011-0880 and adding a numeric suffix (e.g., "EPA-HQ-OW-2011-0880-**20859**"). The record documents cited here use that numbering system.

that are considered "waters of the United States" upon a case-by-case showing of their significant nexus to traditionally covered waters, and (3) waters that are categorically excluded from federal protection. 80 Fed. Reg. at 37,057. Because the Act limits what can be done with respect to "waters of the United States," including by requiring those who make discharges into such waters to obtain a permit, *see* 33 U.S.C. §§1311(a), 1342, 1362(7), 1362(12), the definition of "waters of the United States" functions as a limitation on dischargers. It also governs the issuance of NPDES permits from regulators by identifying the water bodies as to which permits must be sought.

III. Challenges to the Rule

Section 509(b)(1) of the Clean Water Act, 33 U.S.C. §1369(b)(1), provides that challenges to certain actions of the EPA Administrator must be made in circuit court within 120 days of the relevant action. The specified actions include those taken "(E) in approving or promulgating any effluent limitation or other limitation" under enumerated sections of the Act, and "(F) in issuing or denying any permit under section 1342." 33 U.S.C. §1369(b)(1).

Over 100 parties sued to challenge various aspects of the Rule. Although the petitioner here is an exception, most parties filed challenges in both district court and circuit court. Challengers sued in the District of Arizona, the Northern District of California, the District of the District of Columbia, the Northern District of Florida, the Northern and Southern Districts of Georgia, the District of Minnesota, the District of North Dakota, the

Southern District of Ohio, the Northern District of Oklahoma, the Southern District of Texas, the Western District of Washington, and the Northern District of West Virginia.[2] The government moved to consolidate these district court cases, but the Judicial Panel on Multidistrict Litigation denied the request. *See In re Clean Water Rule*, 140 F. Supp. 3d 1340, 1341, MDL No. 2663 (Oct. 13, 2015). The circuit court petitions, meanwhile, were promptly consolidated in the U.S. Court of Appeals for the Sixth Circuit. MCP No. 135, Dkt. 3 (July 28, 2015).

Petitioner National Association of Manufacturers (NAM) filed a district court action with other parties in Galveston, Texas. *See* Tex. Compl. at 1. But while its co-parties also brought actions in the court of appeals, petitioner did not. Instead, it intervened defensively in the Sixth Circuit to support dismissal of the circuit court actions in favor of district court review. *See* 6th Cir. No. 15-3820, Dkt. 6. While petitioner's district court action challenging the Rule made substantial standing-related allegations describing the effect of the Rule on its members,

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[2] D. Ariz. No. 15-cv-1752; N.D. Cal. No. 15-cv-3927; D.D.C. No. 15-cv-1324; N.D. Fla. No. 15-cv-579; N.D. Ga. No. 15-cv-2488; S.D. Ga. No. 15-cv-79; D. Minn. No. 15-cv-3058; D.N.D. No. 15-cv-59; S.D. Ohio No. 15-cv-2467; N.D. Okla. Nos. 15-cv-386 & 15-cv-381; S.D. Texas Nos. 15-cv-162, 15-cv-165, 15-cv-266, 15-cv-322; W.D. Wash. No. 15-cv-1342; N.D. W.Va. No. 15-cv-110.

petitioner made no similar effort in the court of appeals.[3]

Respondents NRDC and NWF filed narrow challenges to the Rule in both district court (D.D.C.) and circuit court (the Second and D.C. Circuits respectively). NRDC and NWF challenged certain aspects of the Rule as failing to protect waters that the groups' members use and enjoy. NRDC and NWF also intervened in various challenges, including the Sixth Circuit proceedings, to defend against claims that the Rule protects *too many* waters. *See* 6th Cir. No. 15-3751, Dkt. 23-2. Such claims would undermine federal safeguards for waters on which NRDC and NWF members rely for drinking water supply; for swimming, fishing, and other recreation; and for business purposes.

On February 22, 2016, the Sixth Circuit denied motions to dismiss for lack of subject matter jurisdiction that had been filed by various parties in the consolidated proceedings. Although there was no

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[3] Petitioner did file a declaration in the Sixth Circuit regarding its standing, but that appears to have been an accident. The declaration was appended to the brief of various petitioners in that court, but NAM was not a petitioner in the Sixth Circuit and did not join that brief. *See* 6th Cir. No. 15-3751, Dkt. 129-1, 129-2; *see also id.* Dkt. 129-2 at ECF page 45-46 (Declaration of Ross Evan Eisenberg) at ¶7 (declaring that NAM's members "have altered their behavior in response to the Final Rule"). To the extent this apparently mistaken filing appended to the brief of *other* parties is relevant, it confirms NAM's continued endorsement of the standing allegations it made in the district court.

majority opinion, two judges held that jurisdiction for challenges to the Rule lay in the circuit court under 33 U.S.C. §1369(b)(1)(F). En banc review was denied. This Court then granted certiorari.

SUMMARY OF THE ARGUMENT

Challenges to the Clean Water Rule belong in the courts of appeals. Section 509 of the Act provides that "any interested person" may petition the courts of appeals for "[r]eview of the Administrator's action ... (E) in approving or promulgating any effluent limitation or other limitation under section 1311" or "(F) in issuing or denying any permit under section 1342." 33 U.S.C. §1369(b)(1). This Court's previous interpretations of section 1369(b)(1) look to the practical effects of agency action to determine whether the section's provisions apply. *See, e.g.*, *Crown Simpson*, 445 U.S. at 196 (holding that section 1369(b) covers EPA decisions with "the precise effect" of causing an NPDES permit to be denied, even if the action is not itself a permit denial). The Clean Water Rule is subject to review in the court of appeals under either subsection (E) or (F), but the simplest path to affirmance is the former. The Rule approves effluent and other limitations on dischargers like petitioner's members because it specifies that the fundamental prohibition of section 1311(a) applies to their discharges into certain waters.

Rather than acknowledge that the Clean Water Rule imposes such limitations, petitioner argues that the Rule has no direct effects on regulated entities at all. As we explain below, the Court could not accept that premise and grant petitioner relief, because the premise suggests that petitioner's case is not

justiciable. And in any event, the premise is not true, as petitioner itself has admitted in the district court action it seeks to protect here.

This case arises in a peculiar posture. Petitioner ultimately hopes to invalidate the Clean Water Rule, but here asks that petitions seeking to invalidate the Rule be dismissed—apparently frustrating its own primary objective. To the extent petitioner has any interest in the judgment it seeks, it is because it believes it can challenge the Rule in district court, and that a determination that the court of appeals erred in taking jurisdiction will allow it to shop this case to its favored forum in the Southern District of Texas at Galveston. *See* Tex. Compl. at 1.

But the arguments petitioner has chosen to press in its opening brief undermine the Court's ability to decide the question presented. In a rare turn for a party challenging administrative action, petitioner, echoing language from the Rule's preamble, argues that the Rule "'does not establish any regulatory requirements' and 'imposes no enforceable duty' on 'the private sector.'" Pet. Br. 29 (quoting 80 Fed. Reg. at 37,054, 37,102). But if the Court were to accept that characterization of the Rule, petitioner would likely be unable to seek review of the Rule at all. Instead, it would have to contend simultaneously with an apparent absence of (1) standing, (2) ripeness, and (3) final agency action. Without a justiciable challenge to the Rule, petitioner's interest in this proceeding would evaporate, along with the Court's jurisdiction over the petition for certiorari.

Because, in this Court, petitioner seeks to have the circuit-level petitions dismissed, it has little incentive to develop allegations in support of its

standing to challenge the Rule itself, along with other requirements for a justiciable case. But the standing allegations in petitioner's district court action in Texas make clear that petitioner understands the Clean Water Rule to have the effect of approving limitations on its members' discharges into water bodies covered by the Rule's jurisdictional definition. Indeed, petitioner's core standing allegation in district court is that its members are already "*abstaining* from certain activities in certain areas of land" and "have initiated or will soon initiate the process of" obtaining "NPDES permits ... in order to *comply or mitigate the risk of noncompliance with the Rule*." Tex. Compl. at 13, ¶¶34-35 (emphasis added); *see also id.* at 14, ¶38 ("[T]he Rule *requires* members of the Plaintiffs either to alter their activities to *avoid discharges* to these features or to *obtain permits* when previously they would not have had to." (emphasis added)).

Forcing petitioner to concretize its injuries in this Court thus helps to demonstrate the illogic of exempting petitioner's challenge from section 1369. As petitioner's district court complaint makes clear, the Clean Water Rule *right now* imposes section 1311(a)'s core limitation on "activities in certain areas of land" and requires NPDES permits for certain discharges into waters found on those lands. *See* Tex. Compl. at 13-14, ¶¶34-38. And that is sufficient to bring petitioner's challenge to the Rule within section 1369(b)(1)(E) and resolve this case against it.

Accordingly, despite petitioner's failure to demonstrate its case's justiciability in this Court, the Court should not dismiss the present petition, but

instead should resolve the question presented in consideration of the Rule's actual effects. Because petitioner's complaints about the Rule are justiciable and belonged in the court of appeals, this Court should affirm.

ARGUMENT

Both the text of section 1369 and this Court's previous interpretations of it compel the courts to look to the practical effects of agency action to determine whether it falls within the section's provisions. Applying that basic principle here demonstrates that the court of appeals is the appropriate court to decide challenges to the Clean Water Rule.

The statutory text provides that "any interested person" may petition the court of appeals for "[r]eview of the Administrator's action ... (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [or] (F) in issuing or denying any permit under section 1342 of this title." 33 U.S.C. §1369(b)(1). The "interested person" has 120 days to petition the court of appeals for review, unless its petition "is based solely on grounds which arose after such 120th day." *Id.* And if the party fails to go to the court of appeals for review when it was available—if "review could have been obtained under [§1369(b)](1)"—then the unreviewed action "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id.* §1369(b)(2); *see also Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013) (where section 1369(b)(1) applies, it is exclusive).

Notably, this formulation is functionalist by its terms. Interested parties can seek review of "action[s]" taken "*in approving or promulgating* any effluent limitation or other limitation," or "*in issuing or denying* any permit," rather than review of "limitations" or "permits" as such. The difference may seem small but it is important. For example, the statutory text supports judicial review of actions that have the effect of approving limitations on regulated parties; the alternative formulation would support review of only "limitations" themselves.

Consistent with this textual distinction, this Court has twice endorsed a functionalist reading of this provision over a formalist one that would require courts to characterize the action itself as a "limitation" or "permit decision." First, in *E.I. du Pont*, this Court explained that the power to review individual permit decisions should necessarily encompass the power to review the basic rules that control them. It derided as "truly perverse" a "situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to §402 but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont*, 430 U.S. at 136. In *Crown Simpson*, this Court confronted an EPA decision with "the precise effect" of causing an NPDES permit to be denied, but that could not itself be characterized as a permit denial, because a State entity was the ultimate permitting authority. 445 U.S. at 194, 196. It held that this situation, too, was subject to judicial review under section 1369, because the Court was, again, "unwilling to read the Act as

creating such a seemingly irrational bifurcated system" of review. *Id.* at 197.

Importantly, petitioner's reading of section 1369 is not only inconsistent with the functionalist principle of these decisions, but also with the *holding* of *Crown Simpson*. Petitioner suggests that, whenever EPA does not "issue or deny" a permit, its action is not subject to review under section 1369(b)(1)(F). *See* Pet. Br. 22 ("The fact that the WOTUS Rule does not issue or deny permits should end the analysis."). But EPA *did not issue or deny a permit* in *Crown Simpson*. It is no answer to say that, by vetoing a State variance in the permit that was requested, the "precise effect" was to deny the permit. That is simply an acknowledgment that actions of the Administrator that do not themselves deny permits may fall within the textual grant of review for actions taken "in ... denying permits." And that is the point: To know what actions fall within the textual grants, the courts must consider the practical effects of those actions, instead of trying to characterize the actions themselves as "limitations," "permit denials," or the like. Accordingly, in the context of the Clean Water Rule, the question is whether the Rule's enactment has the effect of approving limitations on certain dischargers (for instance, petitioner or its members), or the effect of issuing or denying permits in certain circumstances.

That question has a particularly straightforward answer under section 1369(b)(1)(E). In enacting the Clean Water Rule, the Administrator approved a limitation on dischargers under section 1311(a) itself. That is, in fact, the principal effect of the Rule. The most fundamental limitation in the Clean Water Act

is section 1311's edict that, "[e]xcept as in compliance" with other enumerated sections of the Act, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a). And the statute defines "discharge of a pollutant" to mean a discharge into "navigable waters," or "waters of the United States." *Id.* §§1362(7), (12). Accordingly, the "precise effect" of the Clean Water Rule is to impose a "limitation under section 1311" on those who discharge into waters deemed jurisdictional by the Rule.[4] Additionally, the Clean Water Rule (in the statute's words) "approves" other limitations under section 1311, including effluent limitations, on discharging entities. That is because, by specifying where section 1311(a)'s limitation applies, the Rule also imposes on dischargers many further limitations, including "effluent limitations," that apply to them only through this central prohibition and its animating role in the Act. *See supra* p.4 (explaining that, in general, the Act's limitations are made applicable to dischargers through the permitting process and section 1311(a)).

This becomes all the more clear when a central premise of petitioner's argument is rejected, as it must be. To make it seem that the Clean Water Rule neither imposes limitations ("effluent" or "other"-wise) nor directly affects permitting decisions,

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[4] The Rule itself can also be considered the promulgation of a limitation under section 1311, because it limits where dischargers can dispose of pollutants without complying with the Act under section 1311(a).

petitioner argues that the Rule has no direct effects on regulated entities at all. As explained below, the Court could not accept that premise and grant petitioner relief, because the premise suggests that petitioner's case in this Court is not justiciable. And in any event, the premise is not true, as petitioner itself has admitted in the district court action it seeks to protect here.

I. Petitioner's Premises, If Accepted, Would Suggest That It Lacks Any Justiciable Challenge To The Clean Water Rule.

In a typical administrative law action, a challenger will take pains to demonstrate that the agency action at issue directly causes the party to suffer concrete injuries that a court can redress by adjudicating the party's case. That is because the challenging party must overcome three closely related statutory and constitutional limitations on the courts' power to review an administrative decision. In particular, the party must assure the court that it has Article III standing, *see, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), that its challenge has ripened into a sufficiently concrete controversy, *see, e.g.*, *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003), and that it challenges "final agency action" rather than an interim step in the agency's activities that does not yet settle the party's legal rights. *See* 5 U.S.C. §704; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Because of petitioner's unusual posture in this case, these issues require some excavation. Petitioner and its supporting respondents want to challenge the

Clean Water Rule, but are asking this Court to dismiss all challenges to the Clean Water Rule that have been brought in the courts of appeals. Typically, only *defendants* want an action dismissed, but justiciability concerns like standing and ripeness impose requirements that *plaintiffs* must meet before a court can take jurisdiction over their suits. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) ("To state a case or controversy under Article III, a *plaintiff* must establish standing." (emphasis added)). It thus may seem unnatural to ask petitioner, which seeks dismissal here, to satisfy the Court about its concrete stake in the underlying controversy.

Petitioner must still comply with these requirements, however, because it is appealing the judgment below, and so must establish a "personal stake" in seeing that judgment overturned. *See, e.g.*, *Camreta v. Green*, 563 U.S. 692, 702 (2011).[5] Here, that personal stake depends on there being a valid district court action petitioner could use to bring its challenge in lieu of the court of appeals procedure. Otherwise, this Court's decision to dismiss challenges to the Rule could hardly provide petitioner with any redress.

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[5] This would have been a much simpler matter if petitioner had proceeded in the normal course—*i.e.*, appealing an adverse judgment or order in its own district court case. Ordinarily, a party is not allowed to appeal a judgment as "adverse" simply because of its precedential effect in another case. *See, e.g.*, *Parr v. United States*, 351 U.S. 513, 516 (1956) ("Only one injured by the judgment sought to be reviewed can appeal.").

Nonetheless, petitioner's temporary focus on winning dismissal of the Clean Water Rule challenges that were brought in the court of appeals has led it to make allegations incompatible with these justiciability requirements. It is easier for petitioner to cast section 1369 as inapplicable to the Clean Water Rule if it minimizes the Rule's concrete effects on, and "direct and appreciable legal consequences" for, petitioner's members. *See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016) (quoting *Bennett*, 520 U.S. at 178). Thus, in a particularly arresting passage for any seasoned administrative lawyer, petitioner trumpets certain passages from the Rule's preamble and the opinion below stating that "the Rule ... 'does not establish any regulatory requirements,'" "'imposes no enforceable duty' on 'the private sector,'" "'is definitional only,'" and "'does not *directly* impose any restriction or limitation.'" Pet. 29 (quoting 80 Fed. Reg. at 37,054, 37,102 and Pet. App. 15a (McKeague, J.)). These allegations form the entire support for petitioner's primary submission that the Clean Water Rule "is not a 'limitation' in any ordinary sense of the word," Pet. Br. 28, and so falls outside the scope of section 1369. *See also* Pet. Br. 17 (claiming the Rule "limits no action"). But these statements would be just as much at home in a brief arguing that petitioner lacks a justiciable challenge to the Rule at all.[6]

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[6] Petitioner also suggests that the Rule is not a limitation because "by itself" it requires no action, and instead imposes

In truth, such allegations are not credible; petitioner contradicts them in its district court action, as it must. Nor are they true: The Rule had obvious impacts immediately upon taking effect—that is one reason the Rule is now *stayed*. Moreover, even if petitioner's allegations were true, this Court could not accept them as a premise for providing petitioner with the judgment it seeks. That is because, if the Court were to accept them here, that would poison petitioner's claim in district court, leaving petitioner with no interest in obtaining the reversal it seeks here, and dissolving this Court's certiorari jurisdiction.

This is so with respect to all three justiciability requirements described above. First, with regard to standing, this Court's familiar test requires that "three conditions [be] satisfied: The petitioner must

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obligations only "in conjunction with other, separate statutory concepts"—such as whether the activity also involves a "point source." *See* Pet. Br. 6-7, 9. But that argument proves too much: The same could be said even of limitations that are, strictly speaking, "effluent limitations." For example, an effluent limitation also applies only to "point sources." *See, e.g.*, 40 C.F.R. §401.10 (explaining that "[p]oint sources" are required to comply with applicable regulations prescribing effluent limitation guidelines). Put otherwise, creating obligations on parties "only when multiple additional statutory terms ... apply," Pet. Br. 17, is something the Clean Water Rule has *in common* with effluent limitations. Indeed, as explained above, many "effluent limitations" and "other limitations" also limit parties only through the mechanism of section 1311(a) and the permitting process—just as the Clean Water Rule does. *See supra* p.4.

show that he has 'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'" *Camreta*, 563 U.S. at 701 (quoting *Lujan*, 504 U.S. at 560-61). Here, petitioner and its members seek to challenge the Clean Water Rule as regulated parties. But if the Rule does not require them to do or refrain from doing anything—if "it limits no action" and is not for them "a 'limitation' in any ordinary sense of the word," Pet. Br. 17, 28—then they have apparently suffered no harm traceable to the Rule, and can obtain no redress from its vacatur.

Likewise, taking petitioner's claims at face value would cast doubt on whether it is "aggrieved" by "final agency action." 5 U.S.C. §§702, 704. As this Court recently explained in the context of jurisdictional determinations under the Clean Water Act, this means the action complained of "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett*, 520 U.S. at 177-78). It seems unlikely that "rights or obligations have been determined" if, as petitioner claims, the Rule "'imposes no enforceable duty' on 'the private sector.'" Pet. Br. 29 (quoting 80 Fed. Reg. at 37,054, 37,102).

Third, petitioner's litigating position in this Court would, if accepted, raise ripeness problems, even though ripeness is typically no obstacle in a case like this. Substantive rules that "require[] the plaintiff to adjust his conduct immediately" are ripe for review "at once." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). But in this Court, petitioner appears to deny that the Clean Water Rule imposes

immediate limitations. In fact, petitioner seems to suggest that its own challenge to the Rule is unripe in language that remarkably parallels the governing standards. *Compare, e.g., Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171 (1967) (finding challenge to color-additive regulations ripe because the regulations were "self-executing" and had "an immediate and substantial impact upon the [challengers]") *with* Pet. Br. 29 ("The Rule ... 'is not self-executing.'") *and* Pet. Br. 11 (quoting the agencies' economic analysis as finding that the Rule "is not designed to 'subject' any entities of any size to any specific regulatory burden").

The justiciability trap that petitioner has set for itself would disappear if petitioner would acknowledge that the Clean Water Rule imposes immediate limitations on its members' conduct. NRDC and NWF have certainly acknowledged the Rule's effects in *their* challenges. In particular, NRDC and NWF object to some of the Rule's provisions limiting the Clean Water Act's reach, *see* 6th Cir. No. 15-3751, Dkt. 130 at 5 (Opening Br. of NRDC et al.), and thus imposing the limitations of the Act too narrowly—effectively allowing discharges that will harm water bodies NRDC's and NWF's members use and enjoy. Petitioner, meanwhile, in its district court action, seeks to challenge the Rule on the inverse ground that the Rule injures its members by applying the Act's limitations and permit requirements too broadly, and by including certain features petitioner argues should not be covered by the law. Tex. Compl. ¶¶3, 38. Neither challenge should present justiciability problems or escape section 1369.

As further explained below, petitioner's own pleadings in the district court action it favors reveal that, in enacting the Clean Water Rule, EPA *did* approve "limitation[s] under section 1311" on petitioner and its members. Most obviously, the agency applied, to the features the Rule covers as "waters of the United States," the Act's core limitation under section 1311(a), which prohibits "the discharge of any pollutant by any person" into those waters "[e]xcept as in compliance with" the Act. 33 U.S.C. §1311(a); *id.* §§1362(7), (12). Petitioner should either acknowledge these concrete effects or articulate an alternative explanation of its standing. Any reasonable explanation of the Rule's effects demonstrates the justiciability of this case and the propriety of jurisdiction in the court of appeals under section 1369(b)(1)(E).

II. Petitioner's Allegations In District Court Reveal That Its Challenge Is Covered By Section 1369.

Petitioner's allegations in the district court litigation it prefers acknowledge far more candidly the consequences of the Clean Water Rule. In plain English, petitioner's complaint is that the Rule limits what its members can do on their land, and it asks the courts to redress its injuries by lifting those limitations. At a minimum, that clearly brings the effects of the Rule within section 1369(b)(1)(E).

Here is how petitioner puts it in its district court complaint. Devoting three full pages to standing allegations, *see* Tex. Compl. at 12-14, ¶¶30-42, petitioner begins with the fundamental limitation that 33 U.S.C. §1311(a) imposes on its members—

namely, that they cannot engage in "unauthorized 'discharges'" on "land areas" that they "own" or where they "work" if these "constitute 'waters of the United States' under the Rule" and thus "are jurisdictional." Tex. Compl. at 12, ¶30; *see also id.* at 2, ¶2 ("The Clean Water Act (CWA) with limited exceptions prohibits 'discharging ... any pollutant' (33 U.S.C. § 1311(a)) without a Section 402 permit for discharges covered by the National Pollution Discharge Elimination System[.]"). This limitation, the complaint then explains, is backed up by civil and criminal sanctions, Tex. Compl. at 12, ¶32, and can be enforced through citizen suits without the intervention of EPA or any other governmental authority, *id.* at 12-13, ¶33. Accordingly, petitioner says, its "[l]aw-abiding members ... have incurred or will imminently incur continuing economic costs as they *alter their activities* (in particular, *by abstaining* from certain activities in certain areas of land) to accommodate the possibility that their activities will be deemed discharges." *Id.* at 13, ¶34 (emphasis added). In fact, some members "have initiated or will soon initiate the process of obtaining ... NPDES permits ... *to comply ... with the Rule*." *Id.* at 13, ¶35. The sum of these allegations is that the Rule *itself* has limited how petitioner's members can use water bodies on their land and has required them to obtain permits they would not otherwise have sought.

One paragraph of petitioner's complaint exposes particularly clearly why this case appropriately belongs in circuit court under the Act:

> 38. The Rule purports to establish the Agencies' jurisdiction over a wide range of features (such as ephemerally flowing ditches and streams) that

> would not have been deemed jurisdictional before promulgation of the Rule under the Supreme Court's prior interpretations of the Agencies' jurisdiction. Accordingly, *the Rule requires* members of the Plaintiffs either to alter their activities *to avoid discharges* to these features *or to obtain permits* when previously they would not have had to. Vacatur of the Rule would therefore remedy each Plaintiff's members' ongoing injuries, including by relieving them of continuing expenses, preventing arbitrary enforcement of the CWA, and allowing them more fully to use and enjoy various land and water features on their land and at their places of work.

Id. at 14, ¶38 (emphasis added).

Petitioner is here because it thinks the Rule "requires" its members to limit discharges on their lands and obtain NPDES permits they did not need before. And it thinks vacatur of the Rule will redress its members' injuries by lifting the Rule's limitations, which (they allege), have "unlawfully *hinder[ed]*" and "unlawfully *inhibit[ed]* their productive use and enjoyment of land and water features on their lands and at their places of work." *Id.* ¶36 (emphasis added). A party that swore these allegations in court cannot seriously claim that the same Rule "limits no action." Pet. Br. 17.

In this way, the justiciability requirements petitioner at least attempted to meet in its district court litigation lead the jurisdictional inquiry under section 1369 much more easily to the right result. There, petitioner acknowledged that it seeks relief from the Rule's imposition of limitations on its

members, and from the permits they will need issued "to comply ... with the Rule." Tex. Compl. at 13, ¶35. At a minimum, section 1369(b)(1)(E) thus directs petitioners to make an application airing their complaints to the court of appeals, where "[r]eview of the Administrator's action ... in approving or promulgating any effluent limitation or other limitation under section 1311 ... may be had by any interested person." 33 U.S.C. §1369(b)(1).

III. Petitioner's Rule Does Not Provide The Clarity It Promises, And Leads To Untenable Results.

In contrast to the clarity that comes from focusing on the Rule's concrete effects, petitioner's ostensibly literalist approach to section 1369 does not actually provide the certainty it says is so important for jurisdictional rules. *See* Pet. Br. 44-48; *id.* at 47-48 (urging the Court to help end duplicative filing in different courts).

First, any step that tends to restrict court of appeals jurisdiction under section 1369(b)—which is the outcome petitioner advocates—will still result in cautious attorneys filing a protective, duplicative case there, because the far greater risk comes from missing the 120-day window for exclusive review in the court of appeals. A reasonably capacious understanding of jurisdiction under section 1369(b) would tend to reduce duplicative filings, because then attorneys with some confidence that their challenge belongs in the court of appeals would forgo the simultaneous district court challenge (understanding they can always fall back on a still-timely district court action if a court later disagrees). Conversely,

because jurisdiction can always be decided *sua sponte*, even attorneys who strongly suspect they belong in district court under petitioner's narrow reading will remain bound by professional obligation to file in both venues and maintain both cases all the way to a judgment final on direct appeal through this Court, especially if they are at all confused by petitioner's preferred reading of the statute.

And confusion is easy to come by under petitioner's approach. Petitioner describes its interpretation as a "plain text" reading of the statute (Pet. Br. 44), but its State allies concede this reading is not "hyperliteral" (Respondent Ohio et al. Br. 32). For one thing, petitioner's preferred meaning depends on restricting section 1369(b)'s "other limitations" language to "effluent-like" limitations, *see* Pet. Br. 45, a neologism that does not even make grammatical sense. (The limitation *itself* is presumably not supposed to be "effluent-like," unless petitioner is advocating slippery limitations. But if it means "limitations on *things that are like* effluent" that is also unclear—because what things, exactly, are *like* effluent without *being* effluent?).

For another, petitioner's preferred meaning is transparently not a "plain text" interpretation of section 1369(b)(1)(E), because the Clean Water Rule fits comfortably within any literal reading of that section. The Rule approves a limitation under section 1311(a) on discharges into the waters specified in the Rule; its enactment was thus, quite literally, an "action ... approving ... any ... other limitation under section 1311." To escape that plain text reading, petitioner relies entirely on the dubious "no limitation" allegations discussed above, *see* Pet. Br.

28-29, before quickly fleeing from the text to various canons of construction and arguments for why Congress must have meant less than what it said when it used the expansive term "other limitation." Pet. Br. 29-31; *see also id.* at 33 (suggesting that the government's interpretation of section 1369 in another context would "shock" the statute's drafters). Requiring attorneys to guess at how narrowly Congress meant to circumscribe the broad words it picked for section 1369(b)(1)(E) will not enhance jurisdictional clarity or discourage protective filings—particularly compared to simply reading the whole clause for what it says.

Petitioner's brief also wobbles between using different verbs connecting the agency action to the relevant effluent or effluent-esque limitation: At one point, petitioner says the agency action must "impos[e]" such limitations, Pet. Br. 39; at another that it must "issue[]" them. Pet. Br. 45. Neither of those words are in the statute, *see* 33 U.S.C. §1369(b)(1)(E) (jurisdiction applies to agency actions taken "in approving or promulgating" limitations), but they might make a difference in some future case (although not necessarily this one). For example, enactment of the Clean Water Rule both "imposed" the limitation found in section 1311(a) on petitioner's members as to the specified water bodies, and also "issued" a limitation by describing where parties cannot discharge without a permit. Other rules, however, might be formalistically labeled as doing only one or the other. At the very least, smart attorneys will not forgo court of appeals filings when the relevant rule "imposes" limitations on a party, even if it arguably does not "issue" them. If the Court

is interested in eliminating duplication, it should simply reinforce the practical approach courts have long taken to section 1369, and direct parties to go to the court of appeals when the effect of the Rule that injures them appears in the statutory list.

In fact, petitioner's rule leads to a result that is not only confusing, but fundamentally incompatible with the congressional policy enacted in section 1369(b)(2). The statute sends parties who are immediately injured by the listed agency actions to the courts of appeals, and gives them 120 days to raise objections. Parties cannot sit on their hands with respect to such agency action and then raise a challenge later in an enforcement proceeding. 33 U.S.C. §1369(b)(2). Here, petitioner's district court pleading reveals that, even according to petitioner itself, EPA has already approved limitations—even "effluent" or "effluent-like limitations"—on what petitioner's members can do on their lands and work sites by enacting the Rule. As a result, in keeping with the text and policy of section 1369(b)(2), petitioner must bring its challenge to the Rule in the court of appeals.

Put otherwise, if an agency action has *already* imposed limitations on the discharges a party can make, as petitioner apparently believes is true with respect to the Clean Water Rule, it must take that dispute to the applicable court of appeals within 120 days. Any interpretation of section 1369 that suggests otherwise cannot claim to be "clear." Petitioner's challenge thus belonged in the court of appeals under at least section 1369(b)(1)(E), and this Court should affirm.

CONCLUSION

For the foregoing reasons, and others provided in the brief of the United States, this Court should affirm.

Respectfully submitted,

Eric F. Citron
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Washington, DC 20814
(202) 362-0636
ec@*goldsteinrussell*.com

Catherine Marlantes Rahm
Jennifer A. Sorenson
Jon P. Devine, Jr.
NATURAL RESOURCES
DEFENSE COUNCIL
40 W. 20th St.
New York, NY 10011
(212) 727-2700

RECORD AND BRIEFS

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In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, THE NEW MEXICO STATE ENGINEER, THE NEW MEXICO ENVIRONMENT DEPARTMENT, THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov
Counsel for Respondent
State of Ohio

QUESTION PRESENTED

Does the federal rule redefining the "waters of the United States" subject to the Clean Water Act fall within the exclusive, original jurisdiction of the circuit courts of appeals under 33 U.S.C. § 1369(b)(1)?

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INTRODUCTION

In June 2015, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, "the Agencies") issued a final rule purporting to establish an expansive new definition of "waters of the United States" for the entire Clean Water Act. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("the Rule"). With this Rule, the Agencies have attempted to broadly *expand* their power, but narrowly *restrict* the judicial review available for those who would challenge it. In both respects, the Agencies' actions are par for the course.

As for the Agencies' power, this Court has twice rejected their efforts to enlarge their authority beyond what the Clean Water Act allows. *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). The Rule seeks to do so yet again. In fact, the State Respondents—Ohio, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, the New Mexico State Engineer, the New Mexico Environment Department, the North Carolina Department of Environmental Quality, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming—have already obtained a stay of (or a preliminary injunction against) the Rule's expansive reading of the Agencies' authority. *See In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015). But the merits of the Rule are not at issue in the petition for certiorari.

The petition instead concerns judicial review. This Court has also twice rejected the Agencies' efforts to prevent courts from considering claims that they wrongly classified lands as subject to their authority. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 132 S. Ct. 1367 (2012). The Agencies' views on the proper court to challenge the Rule could do so yet again. They argue that the broad Rule falls within a narrow class of specific EPA actions listed in 33 U.S.C. § 1369(b)(1) that are reviewable exclusively by circuit courts. But a finding of "[r]eviewability under section 1369 carries a peculiar sting" for the regulated community: it bars later challenges in subsequent litigation. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992); *see Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). Thus, the Agencies' reading of § 1369 could insulate the Rule from future as-applied challenges like those that this Court considered in *Hawkes* or *Sackett*.

Given the Agencies' efforts to shoehorn the Rule into § 1369(b)(1), the State Respondents find themselves in the same jurisdictional quagmire as Petitioner, the National Association of Manufacturers. They have been forced to litigate duplicative complaints in the district courts and petitions for review in the circuit courts due to the Agencies' so-called "pragmatic" reading of § 1369. The State Respondents file this brief to detail why the Sixth Circuit's fractured 1-1-1 jurisdictional holding is wrong.

First, § 1369's language shows that the circuit courts lack jurisdiction over the Rule. An analysis of § 1369 must begin "'with the language of the statute itself,'" and it should "'end'" there when "'the stat-

ute's language is plain.'" *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (citation omitted). The Agencies have argued that the Rule can fit within the text of § 1369(b)(1)(E) and (F)—arguments that the lead opinion below found "not compelling," Pet. App. 9a (McKeague, J., op.), and that the controlling concurrence found "illogical and unreasonable," *id.* at 29a (Griffin, J., concurring in judgment). Starting with Subsection (E), the Rule does not promulgate an "effluent limitation or other limitation under section 1311, 1312, 1316, or 1345"—four specific provisions directing the EPA to issue distinct types of pollution restrictions. It is instead a *definitional* rule interpreting text found *elsewhere* (in 33 U.S.C. § 1362(7)) for the *entire* Act. Turning to Subsection (F), the Rule does not "issu[e] or deny[]" a permit "under" 33 U.S.C § 1342. The Agencies' interpretation that Subsection (F) covers anything *affecting* permitting reads those verbs out of the statute. That is why the Sixth Circuit could find jurisdiction only by relying on factors—such as policy concerns or circuit precedent—other than the text.

Second, textual canons of construction confirm the plain-text reading of Subsections (E) and (F). For one thing, statutory language should be read against the backdrop of the statute as a whole. The Clean Water Act specifically identifies seven EPA actions subject to immediate appellate review, in stark contrast to the Clean Air Act's broad grant of appellate jurisdiction over all agency actions. It is unlikely that Congress would have intended for this precise language to be interpreted loosely. For another, a statute should be read in a manner that avoids rendering words or phrases superfluous. But a broad

reading of Subsections (E) and (F) would make other jurisdictional grants in § 1369 redundant.

Third, the decision below complicates a relatively straightforward jurisdictional statute, in violation of the principle that courts should read jurisdictional statutes to yield "simple" rules. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Vague rules require "'an enormous amount of expensive legal ability [to] be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases.'" *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment) (citation omitted). This litigation spotlights those hazards. "[C]areful counsel" have had to sue simultaneously at two levels of the judiciary "to protect their rights," *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977), and courts have now spent significant resources to "assure themselves of their power to hear" these issues, *Hertz*, 559 U.S. at 94. Far better for this and all future cases that courts stick to the comparatively simpler rules flowing out of § 1369's text.

Fourth, the Sixth Circuit expands § 1369 in a way that restricts review under the Administrative Procedure Act (APA). The APA establishes a "'presumption of reviewability for all final agency action.'" *Hawkes*, 136 S. Ct. at 1816 (citation omitted). But § 1369(b)(2) bars later "judicial review" of actions that fall within § 1369's purview in a subsequent "civil or criminal proceeding for enforcement." Courts have refused to "read[] § [1369](b)(1) broadly" given these restrictions. *Am. Paper Inst. v. EPA* ("*Am. Paper II*"), 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.); *Longview*, 980 F.2d at 1313. This

Court, too, should affirm the presumption of reviewability by reading § 1369 narrowly—a reading that Justice Powell proposed in a similar setting. *See Harrison v. PPG Indus.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring).

Fifth, and finally, the lead opinion's analysis rests on a mistaken premise that was rejected by a majority of the judges on the Sixth Circuit panel. It misconstrued language from this Court's decisions in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), as creating a "license to construe Congress's purposes in § 1369(b)(1) more generously than its language would indicate." Pet. App. 13a (McKeague, J., op.); *id.* at 17a. In doing so, the lead opinion "expand[ed]" this Court's dicta in those cases well beyond its intended reach. *Id.* at 35a (Griffin, J., concurring in judgment). While *E.I. du Pont* and *Crown Simpson* invoked practical concerns, they did so only to *reinforce* the text, not to *disavow* it.

At day's end, the Sixth Circuit's jurisdictional holding conflicts with § 1369's text and will have negative effects on the scope of judicial review under the Clean Water Act. This holding was mistaken.

STATEMENT OF THE CASE

A. *Relevant Provisions of the Act.* The Clean Water Act generally prohibits any unauthorized "discharge of any pollutant by any person" into waters within the Agencies' reach. 33 U.S.C. § 1311(a). The Act defines "pollutant" broadly to include many ordinary substances, including dirt and other fill materials. *Id.* § 1362(6). It defines "discharge of a pollutant" broadly to cover "any addition of any pollutant

to navigable waters from any point source," such as a pipe or ditch. *Id.* § 1362(12), (14). And it defines "person" broadly to include individuals, corporations, and the States. *Id.* § 1362(5).

The Act establishes two different permitting programs that are relevant to the jurisdictional question at issue here. Under 33 U.S.C. § 1342(a), the EPA issues permits pursuant to the "National Pollutant Discharge Elimination System" ("NPDES"), which allows persons to discharge pollutants that can wash downstream. Under § 1344, the Corps issues permits allowing persons to discharge "dredged or fill material," "which, unlike traditional water pollutants, are solids that do not readily wash downstream," *Rapanos*, 547 U.S. at 723 (plurality op.). Both § 1342 and § 1344 authorize the States to create and operate their own permitting programs for waters within their borders. 33 U.S.C. §§ 1342(b), 1344(g). Most States have done so under the NPDES program in § 1342; two States have done so under the program for dredged and fill material in § 1344.

A permit holder seeking to discharge pollutants generally must abide by several limitations set under other statutory sections of the Act. 33 U.S.C. § 1342(a). Many of these specific sections also implicate the jurisdictional question at issue here. 33 U.S.C. § 1311 directs the EPA to set general "effluent limitations" for pollutant discharges that are tied to the "best available technology" that is "economically achievable" by point sources. In addition, 33 U.S.C. § 1312 directs EPA to set unique limitations that are tied to the chosen water quality standards for specific water bodies. 33 U.S.C. § 1316 directs the EPA to set unique limitations for new sources of pollution.

33 U.S.C. § 1317 directs the EPA to set unique limitations for certain "toxic pollutants." And 33 U.S.C. § 1345 directs the EPA to set unique limitations for "sewage sludge." These limitations are incorporated into specific permits, which "serve 'to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger(s).'" *E.I. du Pont*, 430 U.S. at 119-20 (citation omitted).

Also relevant to the jurisdictional question, on top of source-by-source permitting, 33 U.S.C. § 1313 requires States to set and update "water quality standards" for waters within their borders. "These state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (citation omitted). As part of these standards, States must adopt "individual control strateg[ies]" for certain "toxic pollutants." 33 U.S.C. § 1314(l)(1)(D). If the EPA rejects a State's individual control strategy, the EPA may promulgate its own for the relevant waters. *Id.* § 1314(l)(3).

The phrase "navigable waters" identifies the waters that are covered by "the entire statute," and so it is critical for defining the reach of all of its sections. *Rapanos*, 547 U.S. at 742 (plurality op.). The Act defines "navigable waters" to "mean[] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Corps originally interpreted this phrase to incorporate the "traditional judicial definition," covering only "interstate waters that are 'navigable in fact' or readily susceptible of being ren-

dered so." *Rapanos*, 547 U.S. at 723 (plurality op.). Environmental groups challenged that definition, and a district court invalidated it. *Natural Res. Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). Since then, the Agencies have "adopted a far broader definition." *Rapanos*, 547 U.S. at 725 (plurality op.). This Court has rejected the Agencies' overly broad definition as applied to certain wetlands, *see id.* at 786 (Kennedy, J., concurring in judgment), and to an "abandoned sand and gravel pit . . . which provide[d] habitat for migratory birds," *SWANCC*, 531 U.S. at 162.

B. *The Rule.* The Rule, published in the Federal Register on June 29, 2015, is yet another attempt by the Agencies to define "waters of the United States" far too broadly; if implemented, it would "invariably result[] in expansion of regulatory authority" by the Agencies. Pet. App. 15a (McKeague, J., op.). The Rule is both substantively flawed (because it extends the Agencies' jurisdiction to many lands that should not be covered under this Court's teachings) and procedurally flawed (because it adopted specific distance-based rules in its definition of covered waters that were not in the proposed rule).

More important for present purposes, it is undisputed that the Rule purports *only* to define those waters that are subject to federal regulation under the Clean Water Act. *See* 80 Fed. Reg. at 37,104 ("In this joint rulemaking, the agencies establish a definitional rule that clarifies the scope of the Clean Water Act."). The Rule does not change any of the Act's mechanisms, set any standards or limitations, exempt or include any sources or pollutants, or issue or deny any permits. Indeed, the Rule expressly notes

that it "does not establish any regulatory requirements," *id.* at 37,054, and "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments," *id.* at 37,102.

C. *Judicial Review.* The Clean Water Act divides jurisdiction between the circuit courts and the district courts based on the type of EPA action that is at issue. For most final EPA actions, challengers may sue in the district court under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 704. In most of this Court's recent cases, for example, the plaintiffs who asserted that their lands did not qualify as "waters of the United States" had originally brought suit in district courts under the APA. *E.g.*, *Hawkes*, 136 S. Ct. at 1813; *Sackett*, 132 S. Ct. at 1371; *Rapanos*, 547 U.S. at 765; *SWANCC*, 531 U.S. at 165.

The Act also identifies seven specific actions by the EPA's Administrator that are subject to immediate circuit review. 33 U.S.C. § 1369(b)(1). In particular, it requires circuit review for EPA action:

> (A) in promulgating any standard of performance under section 1316 of this title,
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
> (F) in issuing or denying any permit under section 1342 of this title, and
> (G) in promulgating any individual control strategy under section 1314(l) of this title[.]

Id. These petitions for review must be filed "within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." *Id.* And if a party could have sought review under § 1369, that party cannot later assert the challenge in enforcement proceedings. *Id.* § 1369(b)(2).

D. *State Challenges.* The State Respondents believe that the circuit courts lack jurisdiction over the Rule under § 1369(b)(1) because the Rule is not one of the seven listed actions. So they filed district-court suits challenging the Rule in a total of five actions. *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.); *Ohio v. U.S. Army Corps of Eng'rs*, 2:15-cv-2467 (S.D. Ohio); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *Oklahoma ex rel. Pruitt v. EPA*, No. 4:15-cv-381 (N.D. Okla.).

Yet, given the Agencies' position on jurisdiction, *see* 80 Fed. Reg. at 37,104, and given that § 1369's grant of jurisdiction to circuit courts is exclusive, the State Respondents filed protective petitions for review in the circuit courts under § 1369(b)(1)—a practice that the circuit courts have recommended. *E.g.*, *Inv. Co. Inst.*, 551 F.2d at 1280 ("If any doubt as to the proper forum exists, careful counsel should file

suit in both the court of appeals and the district court."); *see Ohio v. U.S. Army Corps of Eng'rs*, No. 15-3799 (6th Cir.); *Oklahoma ex rel. Pruitt v. EPA*, No. 15-9551 (10th Cir.); *North Dakota v. EPA*, No. 15-2552 (8th Cir.); *Texas v. EPA*, No. 15-60492 (5th Cir.); *Georgia v. McCarthy*, No. 15-13252 (11th Cir.). The State Respondents' petitions were consolidated in the Sixth Circuit with the petitions from many other groups. *See* 28 U.S.C. § 2112(a).

After consolidation, many of the State Respondents filed a motion to stay the Rule, and all of them moved to dismiss their petitions for lack of jurisdiction. The Sixth Circuit granted the stay. *In re EPA*, 803 F.3d at 809. It concluded that the State Respondents had "demonstrated a substantial possibility of success on the merits of their claims." *Id.* at 807. "In light of the disparate rulings . . . issued by district courts around the country," the court reasoned, "a stay [would], consistent with Congress's stated purpose of establishing a national policy, . . . restore uniformity of regulation . . . pending judicial review." *Id.* at 808.

Subsequently, the Sixth Circuit denied the motions to dismiss for lack of jurisdiction in a fractured 1-1-1 decision. The lead opinion, written by Judge McKeague, concluded that the circuit courts had jurisdiction under Subsection (E) and Subsection (F) of § 1369(b)(1). Pet. App. 3a-26a. Citing this Court's cases interpreting § 1369, Judge McKeague believed that the section should be "construed not in a strict literal sense, but in a manner designed to further Congress's evident purposes." *Id.* at 26a. Judge Griffin concurred in the judgment. *Id.* at 27a-45a. He disagreed that the Sixth Circuit had jurisdiction

under the plain text of Subsections (E) and (F), finding the Agencies' reading to be "illogical and unreasonable." *Id.* at 29a. Nevertheless, he believed that the panel was compelled to follow "incorrect" yet binding circuit precedent concerning Subsection (F)'s scope. *Id.* at 44a (discussing *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009)). Judge Keith dissented, agreeing with Judge Griffin's textual analysis but disagreeing that circuit precedent required a finding of jurisdiction under Subsection (F). *Id.* at 45a-47a.

The Sixth Circuit denied immediate en banc review of this holding. *Id.* at 52a. Briefing on the merits remains ongoing in the Sixth Circuit.

ARGUMENT

I. THE COURTS OF APPEALS DO NOT HAVE SUBJECT-MATTER JURISDICTION OVER THE RULE UNDER SECTION 1369(b)(1)

A majority of the Sixth Circuit panel correctly recognized that it would be "illogical and unreasonable" to read § 1369 as granting circuit jurisdiction over the Rule. *See* Pet. App. 29a (Griffin, J., concurring in judgment); *id.* at 45a (Keith, J., dissenting). Of the seven actions triggering jurisdiction under § 1369, the Agencies have claimed that the Rule falls within two: Subsection (E) ("approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345") and Subsection (F) ("issuing or denying any permit under section 1342").

The Agencies are wrong for four basic reasons: (1) the Rule falls outside the plain language of Subsections (E) and (F); (2) several textual canons of

construction confirm that those two subsections cannot be read with the breadth necessary to cover the Rule; (3) this Court's strong preference for bright-line jurisdictional rules supports a plain-text approach to § 1369; and (4) the presumption of agency-action review favors that plain-text reading as well.

A. The Rule Falls Outside The Plain Text Of Subsections (E) And (F)

Subsections (E) and (F) have a parallel structure: specific verbs describing a specific EPA action, a direct object of that EPA action, and a prepositional phrase identifying the statutory section under which the EPA must take the action. Each requirement must be satisfied for jurisdiction to exist under those provisions. The Rule does not satisfy these requirements for either subsection.

1. *Subsection (E).* Subsection (E) grants the circuit courts jurisdiction over EPA action (1) "approving or promulgating" (2) "any effluent limitation or other limitation" (3) "under section 1311, 1312, 1316, or 1345." The two verbs cover both actions that consent to limitations developed *by others* ("approving"), and actions that publish limitations directly created *by the EPA* itself ("promulgating"). *Cf. Webster's New World Dictionary* 68, 1137 (2nd coll. ed. 1972). The use of *both* verbs, moreover, illustrates that this subsection intended for the verb "promulgate" to have a narrow domain, covering only those regulations that directly impose EPA limitations, not "everything [the EPA] issues" in the Federal Register. *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 670 (7th Cir. 1991); *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1994). Any broader interpretation would read "approves" out of the subsection.

Next, the action that the EPA approves or promulgates must be an "effluent limitation" or "other limitation." The Clean Water Act defines "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . ." 33 U.S.C. § 1362(11). This Court has found that these "effluent limitations" include regulations establishing *general* limitations on the discharge of pollutants by certain *categories* of point sources, such as chemical plants. *See E.I. du Pont*, 430 U.S. at 136.

While the Act does not define "other limitation," Congress's use of the phrase "effluent limitation or other limitation" suggests that an "other limitation" must be similar to an effluent limitation. Under "the doctrine of *noscitur a sociis*," courts "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Here, a broad view of "other limitation" would swallow up "effluent limitation"; Congress would have said "any limitation" if it intended for a broad reading. Instead, "other limitation" should be read in context as covering restrictions that are "directly related to effluent limitations" in that they "direct[] . . . point sources to engage in specific types of activity," *Am. Paper Inst., Inc. v. EPA* ("*Am. Paper I*"), 890 F.2d 869, 877 (7th Cir. 1989), such as limits on a point source's cooling water *intake* structures, *Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977).

Finally, the limitation must arise from §§ 1311, 1312, 1316, or 1345. Each section directs the EPA to

create distinct limitations through regulation: § 1311 tells the EPA to promulgate technology-based limits for existing sources; § 1312 directs it to promulgate water-quality-based limits for certain water bodies; § 1316 directs it to promulgate standards of performance that will lead to new-source limits; and § 1345 directs it to promulgate sewage-sludge limits. If, by contrast, a limitation primarily arises from *another* section—such as a water quality standard from § 1313—jurisdiction does not exist. *E.g.*, *Friends of the Earth v. EPA*, 333 F.3d 184, 190 (D.C. Cir. 2003); *Longview*, 980 F.2d at 1312-13; *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 516-18 (2d Cir. 1976).

The Rule does not meet Subsection (E)'s requirements both because it is not a "limitation" and because it does not arise under §§ 1311, 1312, 1316, or 1345. To begin with, the Rule does not promulgate an "effluent limitation or other limitation." It cannot be considered an "effluent limitation" because it nowhere sets limitations on the pollutants that can be discharged into navigable waters. 33 U.S.C. § 1362(11); Pet. App. 9a (McKeague, J., op.). Nor can it be considered an "other limitation" because it does not propose limits on point sources that are at all like effluent limitations. *Va. Elec.*, 566 F.2d at 450; *Am. Paper I*, 890 F.2d at 877. Indeed, the Rule affirmatively disclaims doing so: It "does not establish any regulatory requirements," 80 Fed. Reg. at 37,054, and "imposes no enforceable duty" on "governments" or "the private sector," *id.* at 37,102. "[R]ather, it sets the jurisdictional reach for whether the discharge limitations even apply in the first place." Pet. App. 32a (Griffin, J., concurring in judgment).

In addition, no limitations arise "under" §§ 1311, 1312, 1316, or 1345. The Rule itself "does not emanate from these sections." *Id.* at 31a. It does not set technology-based limits under § 1311, water-quality-based limits under § 1312, new-source limits under § 1316, or sewage-sludge limits under § 1345. Instead, the Rule interprets text—"waters of the United States," 33 U.S.C. § 1362(7)—found in the Act's definitional section. Pet. App. 31a (Griffin, J., concurring in judgment). Far from being tailored to those sections, moreover, the Rule's "definition will apply to all provisions of the Act." 80 Fed. Reg. at 37,104. It applies to many sections—such as § 1313 (which addresses water quality standards) or § 1344 (which addresses the Corps' permitting program for dredged or fill material)—over which jurisdiction does not exist under § 1369. That is why *both* Agencies, not just the EPA, issued the Rule; it covers provisions within the Corps' domain. *Id.* at 37,115-119. That § 1369 grants jurisdiction over *EPA* actions, not actions of *both Agencies*, confirms that the Rule is not an EPA-specific effluent or other limitation.

2. *Subsection (F).* Subsection (F) grants jurisdiction over EPA action (1) "issuing or denying" (2) "any permit" (3) "under section 1342." 33 U.S.C. § 1369(b)(1)(F). "By its plain terms, this provision conditions the availability of judicial review on the issuance or denial of a permit" under the NPDES permitting program in § 1342 (not the Corps' permitting program in § 1344). *Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004). The verb choices are key.

To "deny" a permit, the EPA must "withhold the possession, use, or enjoyment of" it. *The Random House Dictionary of the English Language* 533 (2d

ed. 1987) (defining "deny"); *Webster's*, *supra*, at 378 (defining "deny" as "to refuse the use of or access to"). This Court has thus read the phrase "deny" to encompass an EPA action *vetoing* a state-issued permit under § 1342 because that veto had the "precise effect" of a denial. *Crown Simpson*, 445 U.S. at 196.

To "issue" a permit, the EPA must "give [it] out publicly or officially." *Webster's*, *supra*, at 749. The EPA regularly does so. *E.g.*, *Natural Res. Def. Council v. EPA*, 808 F.3d 556, 562 (2d Cir. 2015) (challenge to "Vessel General Permit"); *City of Pittsfield v. EPA*, 614 F.3d 7, 8 (1st Cir. 2010) (challenge to permit for wastewater treatment plant). Yet, as circuits have agreed, under no fair meaning of "issue" can the verb be read to reach the EPA's failure to object to, and thus silent approval of, a *state-issued* permit. *Lake Cumberland*, 954 F.2d at 1221 & nn.7, 12; *Save the Bay, Inc. v. Adm'r of EPA*, 556 F.2d 1282, 1290-92 (5th Cir. 1977); *Mianus River Pres. Comm. v. Adm'r, EPA*, 541 F.2d 899, 906-10 (2d Cir. 1976).

The Rule does not satisfy Subsection (F). The Agencies do not claim that it actually "issues" or "denies" a permit under § 1342. *E.g.*, Pet. App. 18a-19a (McKeague, J., op.). That should settle the matter. An analysis of § 1369 must begin "'with the language of the statute itself,'" and it must "'*end*'" there when "'the statute's language is plain.'" *Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1946 (citation omitted). The language is plain—it requires the EPA to have issued or denied a permit. The Rule does not do so.

The Agencies instead argue that Subsection (F) should be interpreted to encompass all EPA regulations that will "impact permitting requirements" and "affect[] the granting and denying of permits." Pet.

App. 18a (McKeague, J., op.). Neither text nor precedent supports this reading. As for text, the Agencies would change the statutory language from "issuing or denying" a permit to "affecting or relating to" one. As for precedent, *Crown Simpson*—the only case from this Court on which the agencies rely for this argument—does not justify the Agencies' atextual view. Under a plain-text reading, the EPA veto of a state-issued permit that was at issue in *Crown Simpson* "refuse[d] the use of or access to" the permit and so could be read as denying it. *See Webster's*, *supra*, at 378; *Crown Simpson*, 445 U.S. at 196. Here, the Agencies can offer no interpretation of "issue" or "deny" that could encompass the Rule.

In sum, this case is straightforward under a plain-text reading of Subsections (E) and (F). The Rule neither promulgates limitations under §§ 1311, 1312, 1316, or 1345, nor issues or denies permits under § 1342. That is why a district court, not a circuit court, considered the Corps' initial regulations narrowly defining the scope of "waters of the United States." *See Callaway*, 392 F. Supp. at 686.

B. Textual Canons Of Construction Reinforce That The Circuit Courts Lack Jurisdiction Over The Rule

That Subsections (E) and (F) cannot be interpreted to extend to the Rule is confirmed by a high-level canon of construction and by an in-the-weeds canon of construction: the rule that statutes should be read as a whole and the rule against superfluity.

1. *Reading Statutes As A Whole.* "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and

with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012)). Reading § 1369 as a whole and against the entire Clean Water Act confirms that Subsections (E) and (F) do not reach the Rule. Section 1369(b)(1) precisely identifies seven specific actions down to the subsections under which those actions are authorized. As one example, Subsections (A), (B), and (E) each cite a different action under § 1316. (Subsection (B) refers to a specific EPA variance provision within § 1316 that did not make it into the final law.) It is noteworthy that Congress acted with such specificity in the context of a comprehensive environmental statute. "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Longview*, 980 F.2d at 1313.

If, however, "the exceptionally expansive view advocated by the government is adopted, [§ 1369(b)(1)] would encompass virtually all EPA actions under the" Act. *North Dakota*, 127 F. Supp. 3d at 1053. Take the Agencies' reading of Subsection (F). Nearly every regulation will have some impact on the permitting process because permits must abide by the general limits adopted elsewhere by the EPA. *See* 33 U.S.C. § 1342(a). Similarly, as for the Agencies' view of Subsection (E), most regulations will have some connection to § 1311. The parties who unsuccessfully sought to obtain circuit review of water quality standards issued under § 1313, for example, argued that they were referenced once in § 1311(b)(1)(C). *See Friends of the Earth*, 333 F.3d at 190. Yet it is

unlikely that Congress would have intended these precise provisions to have such general reach.

Comparing § 1369(b)(1) to the jurisdictional grant in the Clean Air Act, the Clean Water Act's sister statute, confirms that § 1369 should not be read in the Agencies' expansive way. Both Acts have judicial-review provisions cataloging actions that circuits may review, but the Clean Air Act goes further by providing circuit jurisdiction over "any other final action of the Administrator." 42 U.S.C. § 7607(b)(1); *Harrison*, 446 U.S. at 589. The Clean Water Act contains no similar catch-all. The conclusion to be drawn could not be clearer: Congress knows how to provide for circuit review of all agency action as a class. It did so under the Clean Air Act, but opted not to do so under the Clean Water Act. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009).

2. *Rule Against Superfluity*. "It is 'a[nother] cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The circuit courts have applied this rule to § 1369(b)(1). Several, for example, have considered whether circuit courts have jurisdiction under Subsection (G)—which covers EPA actions in "promulgating" individual control strategies under § 1314(l)—over an EPA action that *approves* a state-promulgated individual control strategy. *Lake Cumberland*, 954 F.2d at 1221. The courts have universally found jurisdiction lacking based on the rule against superfluity. *Id.* at 1222-24 (discussing cases). They point to Subsection (E),

which unlike Subsection (G), *does* use both "approving" and "promulgating." These courts have refused to write the verb "approving" out of Subsection (E) by reading the verb "promulgating" in Subsections (E) and (G) broadly to cover both actions. *See id.*

This canon equally dooms the Agencies' view. To cover the Rule, Subsections (E) and (F) would have to be read in such a broad manner as would make other subsections superfluous. Subsection (A), for example, grants jurisdiction over an action "promulgating any standard of performance under section 1316" for new sources. If Subsection (E)'s "other limitation" covers anything that could limit the private sector, it would make Subsection (A)'s grant over standards of performance superfluous. Those standards are designed "for the control of the discharge of pollutants." 33 U.S.C. § 1316(a)(1). A broad reading of Subsection (E) thus "allow[s] the term 'other limitation' to swallow up distinctions that Congress made between effluent limitations and other types of EPA regulations" in § 1369(b)(1). *Am. Paper I*, 890 F.2d at 876-77; *Friends of the Earth*, 333 F.3d at 190-91 & n.14.

Similarly, Subsection (C) grants jurisdiction over an action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317" for toxic pollutants. If Subsection (F)'s "issuing or denying any permit" reaches any regulation *affecting* permits, it would make Subsection (C)'s jurisdictional grant over § 1317's toxic-pollutant limits superfluous. After all, § 1342 expressly identifies those toxic-pollutant limitations as a "condition" for a permit's issuance. *Id.* § 1342(a)(1).

C. This Court's Preference For Bright-Line Jurisdictional Rules Supports A Plain-Text Approach To § 1369

That § 1369(b)(1) concerns subject-matter jurisdiction reinforces that it should be interpreted as written. The plain text—not the Agencies' supposedly pragmatic gloss on that text—establishes the *clearer* boundary between the jurisdiction of the circuit courts under § 1369 and the jurisdiction of the district courts under the APA.

1. This Court has a well-established "practice of reading jurisdictional laws, so long as consistent with their language, . . . to establish clear and administrable rules." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567-68 (2016); *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015) (invoking the Court's "rule that '[j]urisdictional rules should be clear'" (citation omitted)). The Court has, for example, adopted a clear rule to identify a corporation's "principal place of business" for purposes of the diversity-jurisdiction statute because "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz*, 559 U.S. at 94. It has done the same when interpreting "final decision" for purposes of the appellate-jurisdiction statute, recognizing that "[c]ourts and litigants [were] best served by the bright-line rule" that it adopted. *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988). Perhaps most famously, the Court has for over a century followed the "well-pleaded complaint rule" for purposes of federal-question jurisdiction, *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908), praising the

"clarity and simplicity of that rule," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009).

Many reasons undergird this general canon of construction for jurisdictional statutes. To begin with, clear rules reduce the time and expense directed away from a case's merits and toward secondary issues. "[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz*, 559 U.S. at 94. With vague rules, by contrast, "'an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases.'" *Sisson*, 497 U.S. at 375 (Scalia, J., concurring in judgment) (quoting Zecheriah Chafee, The Thomas M. Cooley Lectures, *Some Problems of Equity* 312 (1950)). These costs "diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz*, 559 U.S. at 94.

In addition, "[t]he stakes of the inquiry are high[er]" in the jurisdictional context than they are in other contexts. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 813 (6th Cir. 2015) (Sutton, J.). For over two centuries, this Court has held that "'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citation omitted); *Capron v. Van Noorden*, 6 U.S. 126, 127 (1804). Accordingly, "a defect in subject-matter jurisdiction requires a suit's dismissal, no matter how much the parties have spent and no matter how late in the proceedings the defect comes to light." *RTP LLC v. ORIX Real Estate Capital, Inc.*, 827 F.3d 689, 693 (7th Cir. 2016). Not only that, courts "have

an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514. Likewise, courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowels v. Russell*, 551 U.S. 205, 214 (2007). For these reasons, "in matters of jurisdiction," "clarity" "is especially important." *United States v. Sisson*, 399 U.S. 267, 307 (1970). Parties need to know (clearly) where to sue because these effects leave zero margin for error in choosing the forum.

2. This canon of construction shows that the Court should follow the plain text. Unlike the Clean Air Act, *see* 42 U.S.C. § 7607(b)(1), the Clean Water Act cannot be interpreted to grant jurisdiction to the circuit courts for *all* agency regulations, and instead divides jurisdiction between the circuit courts and the district courts. *Cf.* Pet. App. 33a (Griffin, J., concurring in judgment). "Jurisdictional tests are built for more than a single dispute." *Merrill Lynch*, 136 S. Ct. at 1575. It will be far easier in the run of cases to determine on which side of the jurisdictional divide a particular EPA action falls if courts stick to § 1369's text rather than the Agencies' amorphous view of it.

Start with Subsection (E). In most situations, EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" will have clear guideposts. 33 U.S.C. § 1369(b)(1)(E). Most notably, that action will involve the types of specific limitations that those four provisions direct EPA to impose: technology-based limits under § 1311, water-quality-based limits under § 1312, new-source limits under § 1316, or

sewer-sludge limits under § 1345. *See, e.g.*, *E.I. du Pont*, 430 U.S. at 136-37; *see also* Pet. App. 30a-33a (Griffin, J., concurring in judgment).

Under the Agencies' reading, by contrast, it will often be unclear whether a particular EPA action that is not itself a limitation under one of the four sections could have an "*indirect* effect" that should qualify as one. Pet. App. 15a (McKeague, J., op.). In many cases, that view could require litigants to guess at a rule's impact, and courts to engage in jurisdictional fact-finding about a rule's "effects." Regulations defining "waters of the United States" offer a case in point. The relative breadth of a challenged regulation—whether it broadens the definition to *cover* more waters or narrows the definition to *exempt* more waters—could determine whether or not the regulation counts as a "limitation" under Subsection (E) subject to circuit review. Indeed, a regulation could broaden some aspects of the definition but narrow other aspects, making it even murkier where challengers should bring suit. *Cf. id.* at 38a (Griffin, J., concurring in judgment).

Turn to Subsection (F). In most situations, it will be obvious whether a party has challenged EPA action "in issuing or denying [a] permit under section 1342." 33 U.S.C. § 1369(b)(1)(F). The EPA will have issued or denied a permit under § 1342. Under the Agencies' reading, by contrast, it will often be unclear whether a rule adequately relates to the permitting process so as to trigger jurisdiction under Subsection (F). *See* Pet. App. 18a (McKeague, J., op.). Indeed, this Court has had great difficulty interpreting statutes, like ERISA, that use language similar to what the Agencies seek to incorporate into

§ 1369. "[A]s many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). The Agencies thus ask this Court to adopt a vague test that has already proved "excruciating for courts to police" in other contexts. *Merrill Lynch*, 136 S. Ct. at 1575.

In sum, the Agencies' view on jurisdiction "jettison[s] relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Under their approach, nobody will know where to go with challenges to EPA action. This reading would regularly force "careful counsel" to sue in both district courts and circuit courts when challenging regulations under the Clean Water Act. *Inv. Co. Inst.*, 551 F.2d at 1280. All of this litigation would lead to the "eating up [of] time and money" on issues unrelated to the merits (as it has in this case), which would represent a costly initial step for those who seek to challenge EPA action. *Hertz*, 559 U.S. at 94.

D. The Presumption In Favor Of Judicial Review Confirms That § 1369's Plain Text Controls

The presumption of judicial review over agency action confirms that courts should stick with, not depart from, § 1369's text. That is because § 1369(b)(2) restricts the judicial review available for the specific actions that fall within § 1369(b)(1) as compared to the normal judicial review that would otherwise be available under the APA.

"The APA . . . creates a 'presumption favoring judicial review of administrative action.'" *Sackett*, 132 S. Ct. at 1373 (citation omitted). This presumption is a "'strong'" one, and an "agency bears a 'heavy burden'" to overcome it. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted).

The presumption applies, most obviously, when a federal agency claims that the relevant action is not reviewable by courts *at all*. *See, e.g., id.* at 1652-53. Yet it extends beyond that narrow domain to apply whenever an agency argues that a particular statute *limits* judicial review to certain methods. In *Hawkes*, for example, the Agencies argued that the Clean Water Act restricted judicial review of their "jurisdictional determinations"—e.g., determinations that certain lands fell within or outside "waters of the United States"—to the *end* of the permitting process. 136 S. Ct. at 1816. This Court disagreed, invoking the APA's presumption of judicial review to do so. *Id.* It reasoned that "'[t]he mere fact' that permitting decisions are 'reviewable should not suffice to support an implication of exclusion as to other[]' agency actions, such as [the jurisdictional determinations]" that were at issue in *Hawkes*. *Id.*

Under the same logic, circuit courts in this very context have recognized that the APA's presumption *dis*favors a broad reading of § 1369(b)(1). Section 1369(b)(1) provides for judicial review only during a short 120-day window, and, in addition, § 1369(b)(2) bars judicial review of EPA actions that could have been challenged under § 1369 in later "civil or criminal proceeding[s] for enforcement." "Where . . . review is available" under § 1369(b)(1), "it is the exclusive means of challenging actions covered by the

statute." *Decker*, 133 S. Ct. at 1334. Accordingly, as Judge Easterbrook has suggested, the "review-preclusion proviso in § [1369](b)(2) [should] dissuade[]" this Court "from reading § [1369](b)(1) broadly." *Am. Paper II*, 882 F.2d at 289. Its "peculiar sting" should instead lead the Court to interpret § 1369(b)(1) narrowly by finding most EPA actions subject to the general APA standards. *Longview*, 980 F.2d at 1313. Indeed, Justice Powell suggested that "constitutional difficulties well may counsel a narrow construction of" a jurisdictional provision in the Clean Air Act whenever the statutory text would allow such a construction. *Harrison*, 446 U.S. at 594-95 (Powell, J., concurring). The conclusion that the Rule does not fall within Subsections (E) and (F) is, at the least, a plausible construction of those provisions. That suffices to trigger this presumption.

Indeed, this presumption is particularly appropriate for the expansive Rule—which will apply to nearly every section of the Clean Water Act and to the many different ecological environments in the States. Most of the cases to reach this Court implicating the scope of "waters of the United States" have involved *as-applied* challenges that were tied to findings for particular lands. *See Hawkes*, 136 S. Ct. at 1812-13; *Sackett*, 132 S. Ct. at 1370-71; *Rapanos*, 547 U.S. at 729 (plurality op.); *SWANCC*, 531 U.S. at 165. Such as-applied litigation should not be disallowed simply because the Agencies have now adopted a Rule on the scope of "waters of the United States."

II. The Sixth Circuit's Contrary Analysis Misreads This Court's Cases And Mistakenly Invokes Policy Arguments

The Sixth Circuit wrongly held that it has jurisdiction to review the Rule. *First*, Judge McKeague's lead opinion was alone in finding that jurisdiction existed under Subsection (E). Pet. App. 8a-17a. The lead opinion found the Agencies' argument "not compelling" under Subsection (E)'s text. *Id.* at 9a. But it reasoned that this Court's *E.I. du Pont* decision adopted a pragmatic approach to Subsection (E), and, by doing so, unmoored that subsection's scope from "a literal reading of the provision." *Id.* at 10a.

This overreads one sentence in *E.I. du Pont* at the expense of the rest of the decision. While *E.I. du Pont* invoked practical concerns, it did so only to *reinforce* the text. That case concerned effluent limitations that were issued under § 1311 and so fell within Subsection (E)'s core. 430 U.S. at 136 ("We regard [§ 1369](b)(1)(E) as unambiguously authorizing court of appeals review of EPA action promulgating an effluent limitation for existing point sources under [§ 1311]."). The industry, however, had argued for an *atextually* narrow reading of Subsection (E), one permitting review only "of the grant or denial of an individual variance" from those limitations under § 1311(c). *Id.* This Court explained that Subsection (E)'s text was not limited to variances under § 1311(c). *Id.* It noted that "Congress referred to specific subsections of the Act" elsewhere in § 1369(b)(1), and thus Congress "presumably would have specifically mentioned [§ 1311](c) if only action pursuant to that subsection were intended to be reviewable in the court of appeals." *Id.*

Only "*after* a plain textual rejection of the industry's position," Pet. App. 35a (Griffin, J., concurring in judgment), did the Court add important practical concerns. Interpreting Subsections (E) and (F) together, it noted that a contrary reading "would produce the truly perverse situation in which" circuit courts "review numerous individual actions issuing or denying permits" under Subsection (F), but not "the basic regulations governing those individual actions" under Subsection (E). *E.I. du Pont*, 430 U.S. at 136. *E.I. du Pont* thus relied on practical concerns to reinforce the otherwise plain text of Subsection (E); it did not grant circuits a freewheeling license to depart from the text based on policy concerns.

Second, the Sixth Circuit erred in determining that it had jurisdiction under Subsection (F). *See* Pet. App. 17a-24a (McKeague, J., op.); *id.* at 44a (Griffin, J., concurring in judgment). The concurring opinion reached this conclusion only because the panel was required to follow the Sixth Circuit's *National Cotton* decision, which had read Subsection (F) to extend broadly to regulations affecting permits. *See id.* at 42a-44a (Griffin, J., concurring in judgment). *National Cotton* is, of course, no obstacle to this Court adopting the right reading of Subsection (F). And the concurring opinion correctly recognized that *National Cotton*'s "jurisdictional reach . . . has no end" and is "incorrect." *Id.* at 42a, 44a.

The lead opinion also reasoned that this Court's *Crown Simpson* decision "opened the door to constructions other than a strict literal application." Pet. App. 17a (McKeague, J., op.). As noted, however, that case held only that an EPA veto of a state-issued permit qualified as the "denial" of a permit

under Subsection (F). *See Crown Simpson*, 445 U.S. at 196. In that respect, this Court again started with the text: "When EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to 'den[y]' a permit within the meaning of [Subsection (F)]." *Id.* Only then did the Court add the pragmatic point that the review process for permits should not depend "on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-97. This Court again tied its holding to the text; it did not ignore that text.

Third, the lead opinion drew support for its "broader reading" of § 1369(b)(1) from *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985). Pet. App. 21a-24a (McKeague, J., op.). It believed that language in *Florida Power*, a case about the Atomic Energy Act, evinced a general efficiency-based "preference in favor of circuit court review" for all laws. *See id.* at 23a. A majority of the panel correctly rejected the lead opinion's "reliance on a non-Clean Water Act case to support its policy arguments." *Id.* at 43a (Griffin, J., concurring in judgment). "Nowhere" did *Florida Power* "intimate that it was ruling as a matter of general administrative procedure" or sound policy. *Nader v. EPA*, 859 F.2d 747, 754 (9th Cir. 1988). It instead held that jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." *Florida Power*, 470 U.S. at 746.

In addition, *Florida Power*'s "lengthy exegesis of th[e] specific statutes" at issue shows it cannot be applied to a "separate, dissimilar statute" like this one. *Nader*, 859 F.2d at 754. The relevant statutes

used broad terms to describe circuit jurisdiction, reflecting "a congressional intent to provide for initial court of appeals review of all final orders." *Florida Power*, 407 U.S. at 739. *That* intent does not transfer to *this* statute. The "considerable specificity in section 1369(b)" shows that "not all EPA actions . . . are directly reviewable in the courts of appeals." *Narragansett Elec. Co. v. EPA*, 470 F.3d 1, 5 (1st Cir. 2005). Additionally, the statute at issue in *Florida Power* did not contain § 1369(b)(2)'s "review-preclusion proviso," which should lead this Court to review § 1369(b)(1) narrowly even if it were ambiguous. *Am. Paper II*, 882 F.2d at 289.

CONCLUSION

The Sixth Circuit lacks subject-matter jurisdiction over the petitions for review.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Respondent
State of Ohio

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ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
State of Alabama

JAHNA LINDEMUTH
Attorney General
State of Alaska

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CYNTHIA H. COFFMAN
Attorney General
State of Colorado

PAMELA JO BONDI
Attorney General
State of Florida

SAMUEL S. OLENS
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

GREGORY F. ZOELLER
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

ANDY BESHEAR
Attorney General
State of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

BILL SCHUETTE
Attorney General
State of Michigan

JIM HOOD
Attorney General
State of Mississippi

CHRIS KOSTER
Attorney General
State of Missouri

TIM FOX
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

ADAM PAUL LAXALT
Attorney General
State of Nevada

LARA KATZ
Assistant General
Counsel
New Mexico Environment Department

GREGORY C. RIDGLEY
General Counsel
MATTHIAS SAYER
Special Counsel
New Mexico State
Engineer

SAM M. HAYES
General Counsel
North Carolina
Department of
Environmental Quality

WAYNE STENEHJEM
Attorney General
State of North Dakota

E. SCOTT PRUITT
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

HERBERT H. SLATERY III
Attorney General and
Reporter
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia

BRAD D. SCHIMEL
Attorney General
State of Wisconsin

PETER K. MICHAEL
Attorney General
State of Wyoming

RECORDS AND BRIEFS

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No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner.

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF STATE RESPONDENTS OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, THE NEW MEXICO STATE ENGINEER, THE NEW MEXICO ENVIRONMENT DEPARTMENT, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
PETER T. REED
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov
Counsel for Respondent State of Ohio

QUESTION PRESENTED

Does the federal rule redefining the "waters of the United States" that are subject to the Clean Water Act fall within the exclusive, original jurisdiction of the circuit courts of appeals under 33 U.S.C. § 1369(b)(1)?

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INTRODUCTION

The federal government seeks to resuscitate the long-repudiated style of interpretation under which "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). The Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, "the Agencies") make arguments that are the flipside of *Holy Trinity*. In June 2015, they issued a rule purporting to establish an expansive new definition of "waters of the United States" for the Clean Water Act. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("the Rule"). They argue that 33 U.S.C. § 1369(b)(1) grants circuit jurisdiction over challenges to this Rule because—while the Rule does not fall "within the letter" of § 1369(b)(1)—it falls within that provision's efficiency-based animating "spirit." *See Holy Trinity*, 143 U.S. at 459.

The Agencies' purpose-over-text approach to statutory interpretation suffers from two main problems. *First*, "*Holy Trinity* is a decision that the Supreme Court stopped relying on more than two decades ago." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 12 (2012). Nowadays, this Court follows a rule quite different from the one propounded by *Holy Trinity* in 1892 and suggested by the Agencies today—namely, that courts generally "presume Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (citation omitted). The Court's plain-text approach resolves this case.

The Agencies argue that Subsections (E) and (F) of § 1369(b)(1) are broad enough to reach the Rule. Subsection (E) covers EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345"; Subsection (F) covers EPA action "issuing or denying any permit under section 1342." (Unless otherwise indicated, section citations are to Title 33 of the U.S. Code.) The Agencies are wrong. As a matter of pure text, the controlling concurrence below called their interpretation "illogical and unreasonable," Pet. App. 29a (Griffin, J., concurring in judgment), and even the lead opinion described their interpretation as "not compelling," *id.* at 9a (McKeague, J., op.).

Starting with Subsection (E), the Rule does not "promulgat[e]" an "effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." Those four sections direct the EPA to issue distinct types of pollution restrictions: technology-based restrictions (§ 1311), water-quality restrictions (§ 1312), new-source restrictions (§ 1316), or sewage-sludge restrictions (§ 1345). The Rule, by contrast, promulgates a *definition*, not a *limitation*. It even notes that it "does not establish any regulatory requirements." 80 Fed. Reg. at 37,054. Further, the Rule was not issued *under* the four listed sections. It instead defines statutory text ("waters of the United States") found only in a definitional section (§ 1362(7)) under, if anything, the Agencies' general rulemaking authority (*e.g.*, § 1361(a)).

Turning to Subsection (F), the Rule does not issue or deny a pollution-discharging permit under the permitting program established by § 1342. The Agencies instead interpret Subsection (F) far more broadly to cover anything *affecting* § 1342's permitting process. Their interpretation reads the "issuing or denying" verbs right out of the statute. As this Court has already explained to the EPA, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

Second, even under a purpose-based approach, the Agencies' argument—that circuit jurisdiction here promotes § 1369(b)(1)'s alleged efficiency purpose—overlooks that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). "[A]nd it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526. This case proves that point. Other important purposes could have motivated Congress to draft the specific language in § 1369(b)(1) that excludes the Rule.

For one thing, the Agencies' reading muddies a relatively straightforward jurisdictional statute, despite Congress's desire for a "clear and orderly process for judicial review." *See* H.R. Rep. No. 92-911, at 136 (1972). This Court has long presumed that Congress intends for jurisdictional statutes to yield "simple" rules. *Hertz Corp. v. Friend*, 559 U.S. 77, 80, 94 (2010). Vague rules ensure that "'an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much

better spent upon elucidating the merits of cases.'" *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment) (citation omitted). This litigation spotlights those hazards. "[C]areful counsel" have had to sue simultaneously at two levels of the judiciary "to protect their rights," *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977), and many courts have spent significant resources to "assure themselves of their power to hear" these suits, *Hertz*, 559 U.S. at 94. The Agencies' amorphous reading of Subsections (E) and (F) would cement this wasteful double litigation. Parties and courts would routinely find it difficult to determine whether a particular regulation has an "indirect consequence" of initiating limitations found elsewhere in the Act (so as to trigger Subsection (E)), or whether the regulation sufficiently "impact[s] permitting requirements" (so as to trigger Subsection (F)). Pet. App. 10a, 18a (McKeague, J., op.). Far better that courts stick to the comparatively simpler rules flowing out of § 1369(b)(1)'s text.

For another thing, the Agencies' interpretation could restrict the judicial review available in as-applied challenges. This Court has long presumed that Congress intends for final agency action to be judicially reviewable under the Administrative Procedure Act. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016). But § 1369(b)(2) bars judicial review over actions that fall within § 1369(b)(1)'s purview in any later "civil or criminal proceeding for enforcement." Given this restriction, other courts have refused to "read[] § [1369](b)(1) broadly." *Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.). They instead have presumed that Congress did not intend for

§ 1369(b)(2)'s "peculiar sting" to apply to actions not plainly covered by § 1369(b)(1)'s terms. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

At day's end, § 1369(b)(1)'s text resolves this case, and the Court should reject the Agencies' policy-driven reasons for departing from that text.

STATEMENT OF THE CASE

A. The Act's Regulatory Scheme

The Clean Water Act prohibits any unauthorized "discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The Act defines "pollutant" to include many ordinary substances, including dirt and fill materials. *Id.* § 1362(6). It defines "discharge of a pollutant" to cover "any addition of any pollutant to navigable waters from any point source," such as a pipe or ditch. *Id.* § 1362(12), (14). And it defines "person" to include individuals, corporations, and States. *Id.* § 1362(5).

As an exception to § 1311(a)'s ban on discharges, the Act establishes two permitting programs that implicate the jurisdictional question before the Court. Under § 1342(a), the EPA administers the "National Pollutant Discharge Elimination System" ("NPDES"), and issues permits allowing persons to discharge pollutants that can wash downstream. Under § 1344, the Corps issues permits allowing persons to discharge "dredged or fill material," "which, unlike traditional water pollutants, are solids that do not readily wash downstream." *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality op.). Both § 1342 and § 1344 authorize States to operate their own permitting programs for waters within their

borders. 33 U.S.C. §§ 1342(b), 1344(g). Most States have done so under the NPDES program in § 1342; two States have done so under the program for dredged or fill material in § 1344.

A permit holder seeking to discharge pollutants must abide by the limitations that are established under other statutory sections. *Id.* § 1342(a). Many of these specific sections (and a few others) also implicate the jurisdictional question presented here.

Technology Limits (§ 1311). "[C]aptioned 'effluent limitations,'" *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, 118 (1977), § 1311 directs the EPA to establish technology-based "effluent limitations" for *existing* point sources. These limitations were established in "two stages." *Id.* at 121. Early limits were tied to the "best practicable control technology" for point sources or to more stringent state or federal water-quality standards. 33 U.S.C. § 1311(b)(1)(A), (C). Later effluent limitations were tied to the "best available technology economically achievable" (for toxic pollutants) or the "best conventional pollutant control technology" (for conventional pollutants). *Id.* § 1311(b)(2)(A), (E); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 220-21 (2009). These limits are incorporated into specific permits under § 1342(a), which "serve 'to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger(s).'" *E.I. du Pont*, 430 U.S. at 119-20 (citation omitted). For some effluent limitations, however, § 1311(c) allows a point source to seek a variance based on individual need.

Water-Quality Limits (§ 1312). Section 1312 directs the EPA to set more stringent "[w]ater quality related effluent limitations" for specific water bodies.

The EPA may do so if it determines that § 1311(b)(2)'s technology-based limitations would be inadequate to protect public health, water supplies, and certain uses. *See* 33 U.S.C. § 1312(a).

New-Source Limits (§ 1316). Section 1316 directs the EPA to set "[n]ational standards of performance" for "new sources." These new sources must follow a distinct technology-based standard—the "best available demonstrated control technology" at the time that construction begins on the new source. *Id.* § 1316(a)(1)-(2). A State also may enforce new-source standards within its borders if approved to do so by the EPA. *Id.* § 1316(c).

Limits on Toxic Pollutants (§ 1317) & Sewage Sludge (§ 1345). Outside this overarching structure, some pollutants receive specific treatment. Section 1317 directs the EPA to establish a list of, and potentially set more restrictive "effluent standards" for, certain "toxic pollutants." *Id.* § 1317(a). In addition, Section 1345, as amended in 1987, directs the EPA to set either "numerical limitations" on certain toxic pollutants found in "sewage sludge," or "[a]lternative standards" for publicly owned treatment works if those numerical limits are infeasible. *Id.* § 1345(d)(2)-(3); *see* Pub. L. No. 100-4, § 406, 101 Stat. 71-72.

State Water-Quality Standards (§ 1313). Before the Clean Water Act, federal law directed each State to set "water quality standards" for interstate waters "flowing through" the State's borders. *E.g.*, S. Rep. 92-414, at 2 (1971). Section 1313 continues that practice. It directs States to issue and periodically update water-quality standards, and to adopt "total maximum daily loads" for water bodies that cannot

meet those standards through § 1311's technology-based limitations alone. 33 U.S.C. § 1313(a), (c)-(d). "These state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (citation omitted). As part of these standards, States must adopt "individual control strateg[ies]" for "toxic pollutants." 33 U.S.C. § 1314(l)(1)(D). If the EPA rejects a State's individual control strategy, the EPA may promulgate its own for the relevant waters. *Id.* § 1314(l)(3).

B. The "Waters Of The United States" Rule

The phrase "navigable waters" identifies the waters that are covered by "the entire statute," and so its meaning delineates the reach of the Act's sections. *Rapanos*, 547 U.S. at 742 (plurality op.). The Act's definitional section defines "navigable waters" to "mean[] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The Corps originally interpreted the phrase "waters of the United States" under the "traditional judicial definition," which covered only "interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality op.). Environmental groups challenged that definition, however, and a district court invalidated it as too narrow. *Nat. Res. Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). Since then, the Agencies have "adopted a far broader definition." *Rapanos*, 547 U.S. at 724 (plurality op.). This Court has rejected their overly broad definition

as applied to certain wetlands, *see id.* at 786-87 (Kennedy, J., concurring in judgment), and to an "abandoned sand and gravel pit . . . which provide[d] habitat for migratory birds," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) ("*SWANCC*").

The Rule is another attempt by the Agencies to define "waters of the United States" too broadly; if implemented, it would "invariably result[] in expansion of [their] regulatory authority." Pet. App. 15a (McKeague, J., op.). The Rule is unlawful in many respects, including because it extends the Agencies' regulatory authority to many lands that the Act does not cover under this Court's teachings, and because it adopts specific distance-based standards without any record support or public notice. The States have thus obtained a nationwide stay and a preliminary injunction against its implementation. *See In re EPA*, 803 F.3d 804, 807-09 (6th Cir. 2015); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1056-58, 1060 (D.N.D. 2015).

More important for present purposes, the Rule purports *only* to define the waters that are subject to federal regulation under the Act. "In this joint rulemaking," the Rule indicates, "the agencies establish a definitional rule that clarifies the scope of the Clean Water Act." 80 Fed. Reg. at 37,104. The Rule does not change any of the Act's mechanisms, set any standards or limitations, exempt or include any sources or pollutants, or issue or deny any permits. The Rule notes that it "does not establish any regulatory requirements," *id.* at 37,054, and "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain

regulatory requirements that might significantly or uniquely affect small governments," *id.* at 37,102.

C. Judicial Review Under The Act

Seeking to "establish a clear and orderly process for judicial review," H.R. Rep. No. 92-911, at 136 (1972), the Clean Water Act divides jurisdiction between the circuit courts and the district courts based on the type of EPA action that is at issue. For most final EPA or Corps actions, challengers may sue in the district court under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 704. In this Court's recent cases, for example, the plaintiffs who asserted that their lands were not "waters of the United States" sued in district court under the APA. *E.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016); *Sackett v. EPA*, 566 U.S. 120, 125 (2012); *Rapanos*, 547 U.S. at 765 (Kennedy, J., concurring in judgment); *SWANCC*, 531 U.S. at 165.

The Act also identifies seven specific actions by the EPA's Administrator that are subject to immediate circuit review. 33 U.S.C. § 1369(b)(1). In particular, it requires circuit review for EPA action:

> (A) in promulgating any standard of performance under section 1316 of this title,
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
> (F) in issuing or denying any permit under section 1342 of this title, and
> (G) in promulgating any individual control strategy under section 1314(l) of this title[.]

Id. These petitions for review must be filed "within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." *Id.* If a party could have sought review under § 1369(b)(1), that party cannot later assert the challenge in enforcement proceedings. *Id.* § 1369(b)(2).

D. State Challenges To The Rule

The State Respondents believe that circuit courts lack jurisdiction over the Rule under § 1369(b)(1) because the Rule does not fall within one of the seven listed actions. So they filed district-court suits challenging the Rule. *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.); *Ohio v. U.S. Army Corps of Eng'rs*, 2:15-cv-2467 (S.D. Ohio); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *Oklahoma ex rel. Pruitt v. EPA*, No. 4:15-cv-381 (N.D. Okla.).

Yet, given the Agencies' suggestion that the Rule fell within § 1369(b)(1)'s *exclusive* jurisdictional grant, *see* 80 Fed. Reg. at 37,104, the State Respondents filed protective petitions for review in the circuit courts. *E.g., Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977); *see Ohio v. U.S. Army Corps of Eng'rs*, No. 15-3799

(6th Cir.); *Oklahoma ex rel. Pruitt v. EPA*, No. 15-9551 (10th Cir.); *North Dakota v. EPA*, No. 15-2552 (8th Cir.); *Texas v. EPA*, No. 15-60492 (5th Cir.); *Georgia v. McCarthy*, No. 15-13252 (11th Cir.). Those petitions were consolidated in the Sixth Circuit with the petitions from many other groups. 28 U.S.C. § 2112(a).

After consolidation, the States filed motions to dismiss the petitions for lack of jurisdiction. The Sixth Circuit denied the motions in a fractured 1-1-1 decision. Pet. App. 4a (McKeague, J., op.); *id.* at 27a (Griffin, J., concurring in judgment).

The lead opinion, written by Judge McKeague, concluded that the circuit courts had jurisdiction under Subsections (E) and (F) of § 1369(b)(1). Pet. App. 3a-26a. Relying primarily on cases interpreting § 1369(b)(1) rather than the statute's text, Judge McKeague noted that the section had been "construed not in a strict literal sense, but in a manner designed to further Congress's evident purposes." Pet. App. 26a. Under this pragmatic approach, the lead opinion agreed with the Agencies that Subsection (E) could extend to regulations, like the Rule, that had an "indirect consequence" of triggering limitations found elsewhere in the Act. *Id.* at 10a. And the lead opinion agreed that Subsection (F) could cover regulations, like the Rule, that "impact permitting requirements." *Id.* at 18a.

Judge Griffin concurred in the judgment. Pet. App. 27a-45a. The concurrence disagreed that the Sixth Circuit had jurisdiction under the text of Subsections (E) and (F), finding the Agencies' reading to be "illogical and unreasonable." *Id.* at 29a. Nevertheless, the concurrence believed that the panel was

compelled to follow "incorrect" circuit precedent applying Subsection (F). *Id.* at 44a (discussing *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009)). "Absent *National Cotton*," the concurrence would have "dismiss[ed] the petitions for lack of jurisdiction." *Id.* at 45a.

Judge Keith dissented. Pet. App. 45a-47a. The dissent agreed with the concurrence's reading of Subsections (E) and (F). *Id.* at 45a. But the dissent did not read *National Cotton* as compelling a finding of jurisdiction under Subsection (F). *Id.* at 45a-47a.

The Sixth Circuit denied en banc review. *Id.* at 52a. It has since stayed briefing on the merits.

SUMMARY OF ARGUMENT

A. The plain text of Subsections (E) and (F) shows that circuit courts lack jurisdiction over the Rule under § 1369(b)(1).

Subsection (E). Subsection (E) covers EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." This text has three elements. Its verb choices extend to EPA actions that "approv[e]" something adopted by another or that "promulgat[e]" something adopted by the EPA itself. In addition, the thing being approved or promulgated must be an "effluent limitation or other limitation." The Act defines "effluent limitation" to cover certain restrictions on discharges into navigable waters. The Act does not define "other limitation." That phrase is best read as covering restrictions that are similar to an effluent limitation, but that fall outside its technical definition. Finally, the EPA must issue the limitation

"under"—i.e., according to the authority of—four specific sections, § 1311, 1312, 1316, or 1345.

For two reasons, this text does not reach the Rule. *First*, the Rule does not "promulgate" an "effluent limitation or other limitation." It does not issue any restrictions on regulated parties, and instead defines the scope of the phrase "waters of the United States." *Second*, the Agencies did not issue the Rule pursuant to congressional instructions found within the four listed sections; instead, they defined a phrase used only in the definitional section (§ 1362) under, if anything, their general rulemaking authority.

In response, the Agencies argue that Subsection (E)'s text is broad enough to cover regulations, like the Rule, that have a "practical effect" of triggering limitations found *elsewhere* in the Act, such as § 1311(a)'s general ban on discharges into navigable waters. Both text and precedent disprove this interpretation.

As for text, Subsection (E)'s *entire* clause shows that the thing that the EPA "promulgates" itself must be the limitation. Other sections confirm this reading because they treat "effluent limitations or other limitations" as things that *themselves* can be *violated*. *E.g.*, 33 U.S.C. § 1341(a)(4). And the Agencies' argument lacks a logical stopping point. For example, *Sackett v. EPA*, 566 U.S. 120 (2012), considered an EPA action finding specific lands to be "waters of the United States." *Sackett* started in the district court under the APA—even though the agency action had a "practical effect" of triggering the Act's limits. Finally, the Agencies mistakenly argue that the Rule issued "under section 1311" within the meaning of Subsection (E) merely because they ref-

erenced that section in the portion of the Rule that identifies the "legal authority" to adopt it. Yet that portion of the Rule identifies the *entire* Act as providing the Agencies with such authority, and they should not be able to manufacture jurisdiction merely by mentioning a section listed in Subsection (E).

As for precedent, the Agencies argue that *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977), supports their "practical" construction of Subsection (E). But *E.I. du Pont* does not, as the lead opinion below asserted, justify "eschew[ing]" a "literal reading" of Subsection (E). *E.I. du Pont*, in fact, *adopted* a literal reading by rejecting an atextually narrow view that would have limited "under section 1311" to EPA variances issued under § 1311(c). While *E.I. du Pont* also relied on practical concerns, it did so only to reinforce the plain text.

Subsection (F). Subsection (F) covers EPA action "issuing or denying any permit under section 1342." This section has two elements. The EPA must "issue" (grant) or "deny" (refuse access to) "any permit." The issuance or denial must also be "under" (i.e., according to the authority of) § 1342. In this way, the Act splits judicial review for permitting decisions: It authorizes circuit review for EPA permits under the NPDES program in § 1342, and district review for Corps permits for dredged or fill material in § 1344.

Here, the Rule neither issues a permit nor denies one under § 1342. That fact ends the analysis under Subsection (F)'s unambiguous text.

In response, the Agencies argue that Subsection (F) covers all EPA actions that "impact" or "affect" permitting. But the Agencies offer *no* textual hook

for this interpretation, which reads "issuing or denying" out of the subsection. And the holding of *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980)—that an EPA veto of a state-issued permit qualifies as a denial of that permit—comports with the plain text. Under the word's ordinary meaning, "deny" means "to refuse the use of or access to." That is precisely what the EPA veto accomplished. And while *Crown Simpson* also referenced practical concerns, the Court again did so merely to reinforce, not repudiate, the text.

B. The plain language of Subsections (E) and (F) alone decides this case. Nonetheless, reading § 1369(b)(1) as a whole confirms that the Rule is not subject to immediate circuit review. Section 1369(b)(1) establishes circuit review for seven *specific* EPA actions, down to the subsection under which some actions are authorized. This precision should make the Court wary of adopting a loose "practical" construction of § 1369(b)(1). A comparison of that provision to its counterpart in the Clean Air Act illustrates why. The Clean Air Act grants circuit jurisdiction over "any" final EPA action, showing that Congress knows how to provide for broad circuit review when it wants to.

Yet the Agencies' broad reading of Subsections (E) and (F) would permit circuit review over actions that Congress excluded from § 1369(b)(1). Take their reading that "under section 1311" in Subsection (E) covers regulations implicating anything mentioned in that section (such as "navigable waters"). Section 1311 cross-references many provisions, including, for example, state water-quality standards in § 1313. But the Agencies agree that this reference does *not*

allow review over those state standards. Similarly, the Agencies' "affect-permitting" test for Subsection (F) could sweep in Corps permitting rules under § 1344 (as it has in this case), even though § 1369(b)(1) references only § 1342 permits.

In addition, the Agencies' broad reading of § 1369(b)(1) creates superfluous text. A broad view of "under section 1311" in Subsection (E) would render that subsection's reference to other sections (such as § 1312) superfluous. After all, § 1311 cross-references § 1312 too. And the Agencies' "affects-permitting" test for Subsection (F) would sweep in regulations issued under §§ 1311, 1312, 1316, 1317, 1318, and 1343 into that subsection—because § 1342(a) requires permits to adhere to those other sections. That result would conflict with Congress's decision to grant jurisdiction over some, but not all, of those sections in § 1369(b)(1).

C. Lastly, a plain-text reading comports with well-established interpretative presumptions.

1. This Court has held that jurisdictional statutes should set clear rules. The plain-text reading advances this goal; the Agencies' pragmatic view does not. Subsection (E)'s text covers specific EPA-sanctioned restrictions referenced in (and issued according to) four sections. But the Agencies' "indirect-effects" test requires an amorphous inquiry into a regulation's impact. Likewise, Subsection (F)'s text establishes a clear rule—the EPA must issue or deny a permit. But the Agencies' "affects-permitting" test creates an unworkable one.

2. This Court interprets statutes against a background presumption favoring judicial review of agen-

cy action. Both *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), and *Sackett* relied on that presumption to reject the Agencies' argument that challenges to particular actions were premature. The presumption applies here, too, because of § 1369(b)(2)'s limits on judicial review. Indeed, other courts have read § 1369(b)(1) narrowly because, where it applies, § 1369(b)(2) restricts subsequent challenges in later enforcement proceedings. Related constitutional concerns with § 1369(b)(2)'s restrictions reinforce this interpretation.

3. The Agencies' competing presumption, by contrast, has little basis in this Court's precedent. They argue that *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), created a broad preference favoring immediate circuit review over agency action. Yet *Florida Power* nowhere suggests it establishes such a universal efficiency-based rule. It simply resolved the ambiguous text of one law. Section 1369(b)(1), by contrast, *unambiguously* bars appellate jurisdiction here. Besides, this Court's presumption in favor of judicial review of agency action "repudiates" such efficiency concerns—as *Sackett* made clear.

ARGUMENT

CIRCUIT COURTS LACK SUBJECT-MATTER JURISDICTION OVER THE RULE UNDER § 1369(b)(1)

The Agencies assert that the Rule falls within Subsections (E) and (F) of § 1369(b)(1). Basic principles of statutory interpretation, however, show that neither subsection covers the Rule. Most notably, the Rule falls outside the text of those subsections. When read as a whole, moreover, § 1369(b)(1) reiterates that Subsections (E) and (F) cannot be given the

breadth needed to cover the Rule. Finally, two of this Court's working presumptions—those presuming that Congress intends for bright-line jurisdictional rules and for judicial review over agency actions—confirm the plain-text reading.

A. The Plain Text Of Subsections (E) And (F) Does Not Reach The Rule

As the Court has said time and again, a statutory-interpretation question "begins 'with the language of the statute itself,' and that 'is also where the inquiry should end'" when that language is unambiguous. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (citation omitted). The Court, in other words, "presume[s] Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016).

This "Supremacy-Of-Text Principle" decides this case. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). Under no reasonable reading could the language in Subsections (E) and (F) extend to the Rule. Indeed, a majority of the Sixth Circuit panel has already concluded that the Agencies' reading of these subsections is both "illogical and unreasonable." Pet. App. 29a (Griffin, J., concurring in judgment); *see id.* at 45a (Keith, J., dissenting).

1. The Rule falls outside Subsection (E) because it is not a "limitation" issued under the identified sections

a. Subsection (E) grants jurisdiction to the circuit courts over EPA action (1) "approving or promulgating" (2) "any effluent limitation or other limitation"

(3) "under section 1311, 1312, 1316, or 1345." 33 U.S.C. § 1369(b)(1)(E). This text has three elements.

First, the verbs cover EPA actions that adopt restrictions developed *by others* ("approving"), and EPA actions that issue restrictions developed *by the agency itself* ("promulgating"). *Cf. Webster's New World Dictionary* 68, 1137 (2d college ed. 1972). The use of both verbs, moreover, shows that the verb "promulgate" has a specific meaning, covering regulations that *directly* impose limitations rather than "everything [the EPA] issues" in the Federal Register. *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 670-71 (7th Cir. 1991) (Easterbrook, J.). Any broader reading of "promulgating" would render "approving" in the subsection superfluous. *Id.*

Second, the thing that the EPA approves or promulgates must be an "effluent limitation or other limitation." The Act defines "effluent limitation" as "any *restriction* established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other *constituents* which are *discharged from point sources* into navigable waters . . . ." 33 U.S.C. § 1362(11) (emphases added). Thus, an effluent limitation must restrict *discharges* into navigable waters from *point sources*. *See id.* § 1362(14); *Rapanos v. United States*, 547 U.S. 715, 743-44 (2006) (plurality op.). These "effluent limitations" include EPA regulations that establish *general* restrictions on discharges by *categories* of point sources, such as chemical plants. *See E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, 136 (1977). The EPA regularly adopts or amends those effluent limitations. *See Defenders of Wildlife v. Perciasepe*,

714 F.3d 1317, 1320-21 (D.C. Cir. 2013); 33 U.S.C. § 1311(d).

The Act does not, by contrast, define the phrase "other limitation." The word "limitation" is commonly (if unhelpfully) defined as "something that limits"—that is, something that "restrict[s]" or "curb[s]" action. *See* Webster's, *supra*, at 820 (defining "limitation" and "limit"). Yet Congress's use of the phrase "effluent limitation or other limitation" suggests that an "other limitation" must be similar in kind to an effluent limitation. Under "the doctrine of *noscitur a sociis*," courts "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). A broad view of "other limitation"—as covering anything that restricts anyone—would swallow up the phrase "effluent limitation." If Congress had intended for Subsection (E) to reach any limitation, it would have said "any limitation."

When read in context, therefore, "other limitation" should cover EPA restrictions that are "directly related to effluent limitations" in that they "direct[]" the regulated community "to engage in specific types of activity." *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 877 (7th Cir. 1989) (*"Am. Paper I"*). These types of "other limitations" fall within Subsection (E) even if they do not meet the technical definition of "effluent limitation" because they do not limit *discharges* by *point sources*. The EPA, for example, regulates a point source's *intake* structures by addressing how it *receives* water. These regulations are not "effluent limitations." Yet the phrase "other limitation" allows circuit courts to consider the regulations alongside simultaneously issued effluent limitations. *E.g.*,

ConocoPhillips Co. v. EPA, 612 F.3d 822, 831 (5th Cir. 2010); *cf. PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 713 (1994).

Third, a limitation must be approved or promulgated "under"—i.e., "according to"—"section 1311, 1312, 1316, or 1345." *See Black's Law Dictionary* 1368 (5th ed. 1979). This prepositional phrase clarifies that Subsection (E) "cover[s] a specific set of EPA" restrictions because each of the four sections directs the EPA to issue specific regulations. *Friends of the Earth v. EPA*, 333 F.3d 184, 190 (D.C. Cir. 2003). Section 1311 tells the EPA to establish *technology-based* limitations for *existing* sources. 33 U.S.C. § 1311(b)(1)(A), (2)(A). Section 1312 directs the EPA to establish *water-quality* limitations for more polluted water bodies. *Id.* § 1312(a). Section 1316 directs the EPA to establish limitations on *new* sources. *Id.* § 1316(b)(1)(B). And § 1345 directs it to establish limitations on *sewage sludge*. *Id.* § 1345(d).

Conversely, under basic interpretative principles, a limitation does not fall within Subsection (E) if the EPA's authority to establish it springs from *another* section. "It would be an odd use of language to say 'any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345,'" "if the references to particular sections were not meant to exclude others." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). Circuit courts, for example, have uniformly held that Subsection (E) does not cover the "total maximum daily loads" that States adopt to achieve their water-quality standards because the authority to issue those restrictions arises from § 1313. *Id.* at 1312-13; *Friends of the Earth*,

333 F.3d at 190; *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 516-18 (2d Cir. 1976).

b. The Rule does not meet Subsection (E)'s requirements for two reasons: (1) the EPA did not "promulgate" an "effluent or other limitation," and (2) the EPA did not issue the Rule "under section 1311, 1312, 1316, or 1345."

To begin with, the Rule does not *directly* "promulgate" an "effluent limitation or other limitation." As the Agencies admit, the Rule does not issue an "effluent limitation" because it nowhere announces restrictions on the pollutants that point sources may discharge. 33 U.S.C. § 1362(11); Pet. App. 9a (McKeague, J., op.). Nor can the Rule be considered the "promulgation" of an "other limitation" because it also does not directly issue *any* restriction. To the contrary, the Rule disclaims doing so. It "does not establish any regulatory requirements," 80 Fed. Reg. at 37,054, and "imposes no enforceable duty" on "the private sector," *id.* at 37,102. Instead, the Rule "sets the jurisdictional reach for whether the discharge limitations even apply in the first place." Pet. App. 32a (Griffin, J., concurring in judgment).

In addition, the EPA did not issue the Rule according to the authority of "section 1311, 1312, 1316, or 1345." The Rule does not accomplish the actions that those sections direct EPA to undertake: It sets no technology-based limits under § 1311, water-quality limits under § 1312, new-source limits under § 1316, or sewage-sludge limits under § 1345. The Rule instead interprets language—"waters of the United States"—found *only* in a definitional section. 33 U.S.C. § 1362(7). If Congress gave the EPA the authority to clarify the meaning of § 1362's defini-

tions, that authority would spring from 33 U.S.C. § 1361. Section 1361 allows it "to prescribe such regulations as are necessary to carry out [its] functions under this chapter." *Id.* § 1361(a).

Far from tailored to Subsection (E)'s listed sections, moreover, the Rule's "definition will apply to all provisions of the Act." 80 Fed. Reg. at 37,104. It will govern many sections—such as § 1313 (which addresses state water-quality standards) or § 1344 (which addresses the Corps permitting program)—that are not within § 1369(b)(1)'s reach. Subsection (E)'s citation of § 1311, 1312, 1316, and 1345 should not be read to reach such *general* regulations for the *entire* Act. Indeed, even if those four sections were removed from the Act, that removal would not change whatever authority the Agencies have to clarify the meaning of "waters of the United States" in § 1362. That is also why both Agencies, not just the EPA, issued the Rule. It covers provisions within the *Corps'* domain under § 1344. *See* 80 Fed. Reg. at 37,115-119. That § 1369 grants jurisdiction over EPA actions, not actions of both Agencies, confirms that the multi-agency Rule should not be read as the type of EPA action contemplated by Subsection (E).

c. Only the lead opinion below found Subsection (E)'s text expansive enough to cover the Rule. Pet. App. 8a-17a (McKeague, J., op.). Even that opinion conceded that the Agencies' interpretation was "not compelling." *Id.* at 9a. It nonetheless accepted the argument that the Rule was the "promulgation" of an "other limitation" "under § 1311" based on a "practical construction." *Id.* at 10a. This reading is wrong both as a matter of text and as a matter of precedent.

Text. The Agencies argue that the Rule can be seen as the "promulgation" of an "other limitation" "under § 1311" because its "practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." Pet. App. 17a (McKeague, J., op.); *see id.* at 9a. By expanding the "waters of the United States" subject to the Act, this argument goes, the Rule triggers limitations found *elsewhere*, including § 1311(a)'s ban on discharges. *Id.* at 15a-17a. Subsection (E)'s text cannot extend this far.

As an initial matter, the Agencies read "limitation" in isolation rather than in the context of the entire phrase "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." A reasonable reader of the phrase "promulgating or approving" a "limitation" would interpret it to mean that the thing being issued or approved *itself* must be the limitation. Yet the Agencies' argument hinges on limitations found in *the Act* rather than *the Rule*. They say that the Rule makes more lands subject to § 1311(a)'s ban on discharges. Br. in Opp. 13. But *Congress* (not *the EPA*) promulgated § 1311(a). Congress would have used a verb like "affecting" rather than "promulgating" if it meant for Subsection (E) to reach regulations that implicate restrictions found elsewhere. When read in its entirety, therefore, Subsection (E) refers to "a specific set of EPA actions"—the restrictions that the specific sections direct the EPA to promulgate. *Friends of the Earth*, 333 F.3d at 190.

In addition, other sections of the Act that use the phrase "effluent limitation or other limitation" all convey that the limitation is something that *itself*

can be *violated*—illustrating that it is the EPA regulation that imposes the restriction. Section 1341, for example, requires certain facilities to allow regulators to review their operations to ensure "that applicable effluent limitations or other limitations . . . will not be violated." *Id.* § 1341(a)(4). Section 1365 authorizes citizens to sue for a violation of an "effluent standard or limitation," defined as, among other things, "an effluent limitation or other limitation under section 1311 or 1312." *Id.* § 1365(a), (f). And the Act's whistleblower protections do not extend to employees who "deliberately violate[] any prohibition of [an] effluent limitation or other limitation under section 1311 or 1312." *Id.* § 1367(d). The Rule, however, defines a phrase; it does not establish "any regulatory requirements" that can be violated. *See* 80 Fed. Reg. at 37,054.

The Agencies' broad interpretation of "limitation" also lacks a stopping point. If they correctly read Subsection (E), this Court likely lacked jurisdiction in *Sackett v. EPA*, 566 U.S. 120 (2012). *Sackett* held that an EPA "compliance order"—an order finding lands to be waters of the United States and asserting penalties for discharges—was reviewable by a district court under the APA. *Id.* at 124, 131. This order did something similar to the Rule, but on a smaller scale. It decided that specific lands were waters of the United States, and so it too had a "practical effect" of "*indirectly* produc[ing] various limitations," including § 1311(a)'s prohibition on discharges. *See* Pet. App. 17a (McKeague, J., op.).

Finally, even if the Rule could qualify as a "limitation," the Agencies have not shown that it was issued "under section 1311." The lead opinion sug-

gested that the Rule should be deemed issued "under section 1311" because the Rule identifies that section as authorizing the EPA to issue it. 80 Fed. Reg. at 37,055; Pet. App. 15a-16a n.4 (McKeague, J., op.). But the Rule identifies the *entire* Act as providing the EPA with the authority to issue it, and it lists several sections (such as §§ 1321 and 1344) that are *not* identified in Subsection (E). 80 Fed. Reg. at 37,055. Nor should courts blindly defer to the Agencies' position that they issued the Rule "under section 1311." The Act does not "empower the [EPA], after the manner of Humpty Dumpty in Through the Looking-Glass, to make a regulation an ["other limitation" "under section 1311"] by [its] mere designation" as such in the regulation. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 (1978).

Precedent. To expand Subsection (E), the lead opinion below rested on *E.I. du Pont*. That case, the lead opinion suggested, adopted a pragmatic approach to Subsection (E), and thus unmoored its scope from "a literal reading of the provision." Pet. App. 10a (McKeague, J., op.). *E.I. du Pont* cannot bear the weight that the Agencies place on it.

While *E.I. du Pont* invoked practical concerns, it did so only to reinforce the text. That case concerned effluent limitations that were issued under § 1311 and so fell within Subsection (E)'s core. The Court "regard[ed] [§ 1369](b)(1)(E) as *unambiguously* authorizing court of appeals review of EPA action promulgating an effluent limitation for existing point sources under [§ 1311]." 430 U.S. at 136 (emphasis added). The challengers, however, argued for an *atextual* view of Subsection (E), one permitting review only "of the grant or denial of an individual var-

iance" from those limits under § 1311(c). *Id.* The Court disagreed. *Id.* Conducting a close textual analysis, it noted that "Congress referred to specific subsections of the Act" elsewhere in § 1369(b)(1), and "presumably would have specifically mentioned [§ 1311](c) if only action pursuant to that subsection were intended to be reviewable in the court of appeals." *Id.*

Only "*after* a plain textual rejection of the industry's position," Pet. App. 35a (Griffin, J., concurring in judgment), did the Court add practical concerns. Interpreting Subsections (E) and (F) together, it noted that a contrary reading "would produce the truly perverse situation in which" circuit courts "review numerous individual actions issuing or denying permits" under Subsection (F), but not "the basic regulations governing those individual actions" under Subsection (E). *E.I. du Pont*, 430 U.S. at 136. *E.I. du Pont* thus relied on practical concerns to reinforce Subsection (E)'s language; it did not grant circuit courts a freewheeling license to depart from the language based on those concerns.

The lead opinion also cited three circuit cases that allegedly justified the abandonment of Subsection (E)'s text. Pet. App. 11a-13a (McKeague, J., op.). The cases do no such thing.

Natural Resources Defense Council, Inc. v. EPA, 673 F.2d 400 (D.C. Cir. 1982) ("*NRDC*") (Ginsburg, J.), addressed "Consolidated Permit Regulations" that made compliance with § 1311's limitations a "permit condition" and defined how to calculate those limitations for permits. *Id.* at 401, 404-05. Because the regulations "restrict[ed] who may take advantage of certain provisions or otherwise *guide[d] the setting*

of numerical limitations in permits," they qualified as § 1311 limitations. *Id.* (emphasis added). *NRDC* thus involved "EPA actions *expressly specified* in" Subsection (E). *Friends of Earth*, 333 F.3d at 184 n.15 (discussing *NRDC*).

Virginia Electric and Power Co. v. Costle, 566 F.2d 446 (4th Cir. 1977), addressed regulations governing "cooling water intake structures." *Id.* at 449-50. These are "other limitations." *See PUD No. 1*, 511 U.S. at 713. As the Fourth Circuit noted, the Act expressly requires limitations that are issued under § 1311 (for existing sources) and § 1316 (for new sources) to include these intake-structure restrictions. *Va. Elec.*, 566 F.2d at 450; *see* 33 U.S.C. § 1326(b). Because the intake-structure restrictions were "closely related" to effluent limitations, it would have been "anomalous" to bifurcate review of them. *Va. Elec.*, 566 F.2d at 450; *cf. Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

Finally, *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), addressed EPA letters concerning practices by "publicly owned treatment works." *Id.* at 854, 856. The court ruled that an EPA action qualifies as an "other limitation" under Subsection (E) if "entities subject to the [Act's] permit requirements face new restrictions on their discretion with respect to discharges *or discharge-related processes*." *Id.* at 866 (emphasis added). Applying that interpretation, it held that an EPA letter restricting the manner in which those treatment works *internally* treated wastewater qualified as an "other limitation" under § 1311(b)(1)(B). *Id.*

2. The Rule falls outside Subsection (F) because it does not "issue or deny" a permit under § 1342

a. Subsection (F) grants jurisdiction over EPA action (1) "issuing or denying" "any permit" (2) "under section 1342." 33 U.S.C. § 1369(b)(1)(F). This language has two elements.

First, "[b]y its plain terms, this provision conditions the availability of judicial review on the issuance or denial of a permit." *Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004). The verb choices make this clear. To "deny" a permit, the EPA must "withhold the possession, use, or enjoyment of" the permit. *The Random House Dictionary of the English Language* 533 (2d ed. 1987) (defining "deny"); *see Webster's*, *supra*, at 378 (defining "deny" as "to refuse the use of or access to"). Thus, this Court has read the word "deny" to cover an EPA action that *vetoes* a state-issued permit, because the EPA's veto had the "precise effect" of a denial. *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980).

To "issue" a permit, the EPA must "give [it] out publicly or officially." *Webster's*, *supra*, at 749. The EPA regularly does so. *E.g.*, *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 562 (2d Cir. 2015) (challenge to "Vessel General Permit"); *City of Pittsfield v. EPA*, 614 F.3d 7, 8 (1st Cir. 2010) (challenge to permit for wastewater treatment plant). Yet, as circuit courts have agreed, under no fair reading of "issue" could the verb cover the EPA's failure to object to, and thus silent approval of, a *state-issued* permit. *E.g.*, *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1221 & nn.7, 12 (6th Cir. 1992).

Second, the permit must issue "under" § 1342. That section identifies the permitting program run by the EPA (or state authorities) for pollutants that "readily wash downstream." *See Rapanos*, 547 U.S. at 723 (plurality op.). The EPA, by contrast, lacks authority to issue permits for dredged or fill material—which fall within the Corps' domain under § 1344. *Coeur Ala., Inc. v. Se. Ala. Conservation Council*, 557 U.S. 261, 273-74 (2009). The Act thus splits judicial review for permit decisions. It requires circuit review of EPA permitting under § 1342, *e.g.*, *City of Pittsfield*, 614 F.3d at 8, but district review of Corps permitting under § 1344, *e.g.*, *Nat'l Ass'n of Home Builders v. Army Corps of Eng'rs*, 417 F.3d 1272, 1277 (D.C. Cir. 2005).

b. The Rule does not fall within Subsection (F). The Agencies have *never* argued that the Rule "issues" or "denies" a permit to discharge pollutants under § 1342. *E.g.*, Pet. App. 18a-19a (McKeague, J., op.). Yet the language is plain. Subsection (F) unambiguously requires the EPA to have issued or denied a permit under § 1342. That ends the matter.

c. Despite the plain text, the Agencies stretch Subsection (F) to encompass *all* EPA regulations that "*impact* permitting requirements" or "*affect[]* the granting and denying of permits." Pet. App. 18a (McKeague, J., op.) (emphasis added). Here again, neither the statute's text nor this Court's cases support the Agencies' reading.

As for text, the Agencies assert that the Rule falls within Subsection (F) because it "delineates where permits are required and so sets the entire NPDES permitting scheme in motion." Br. in Opp. 14. This argument rewrites Subsection (F) from "issuing or

denying any permit" to "affecting or relating to the permitting scheme." The EPA cannot do that. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

As for precedent, the Agencies cite *E.I. du Pont* and *Crown Simpson* for their view. Br. in Opp. 14-15. Neither decision helps them. *E.I. du Pont* did not even involve Subsection (F). It interpreted Subsection (E). *See* 430 U.S. at 136.

Crown Simpson, as noted, held that the *veto* of a state-issued permit qualified as the "denial" of a permit under Subsection (F). 445 U.S. at 196-97. To reach that result, the Court started with the text: "When EPA, as here, objects to effluent limitations contained in a state-issued permit, the *precise effect* of its action is to 'den[y]' a permit within the meaning of [Subsection (F)]." *Id.* (emphasis added). Because the EPA veto "refuse[d] the use of or access to" the permit, it could be comfortably read as denying the permit. *Webster's*, *supra*, at 378. Only after concluding that the EPA veto qualified as a denial did the Court add a pragmatic point. The review process for permits should not depend "on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." 445 U.S. at 196-97. This language is best read as using context to confirm what is otherwise a reasonable reading of the text. That is commonplace. "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text." Scalia, *supra*, at 356.

Thus, even if *Crown Simpson* "opened the door to constructions other than a *strict* literal application," Pet. App. 17a (McKeague, J., op.) (emphasis added), there is a wide gap between that case and this one. Here, the Agencies have not offered *any* reading of the phrase "issuing or denying any permit" that could encompass the Rule. Instead, they *bypass* the text by *jumping* immediately to their pragmatic point about the efficiencies of circuit review. Br. in Opp. 14-15. It is one thing to rely on a pragmatic factor to choose between two plausible interpretations of a text (as *Crown Simpson* did). It is quite another to rely on that factor to *depart* from the only plausible reading of the text (as the Agencies do). Such a contextual consideration can inform an ambiguous text; it cannot rewrite an unambiguous one.

Finally, the concurring opinion below reached its result *only* because it felt bound by *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009), which read Subsection (F) to cover rules *affecting* permits. Pet. App. 42a-44a (Griffin, J., concurring in judgment). This Court, of course, is not so bound. It should reject *National Cotton* for the reasons that the concurrence gave. *National Cotton*'s "incorrect" "jurisdictional reach . . . has no end." *Id.* at 42a, 44a. And that decision "provided no analysis" of Subsection (F)'s text. *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012).

* * *

In sum, this case is straightforward under the only reasonable reading of Subsections (E) and (F). The Rule neither promulgates effluent or other limitations under § 1311, 1312, 1316, or 1345, nor issues or denies permits under § 1342.

B. Section 1369(b)(1), When Read As A Whole, Reinforces That Subsections (E) And (F) Do Not Cover The Rule

Reading § 1369(b)(1) as a whole and against the backdrop of the entire Act confirms that Subsections (E) and (F) cannot have the breadth that the Agencies seek to give them.

1. *Reading § 1369(b)(1) As A Whole.* "'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012)). This canon reinforces the plain language of Subsections (E) and (F).

Section 1369(b)(1) authorizes circuit review over seven specific EPA actions down to the subsections under which some of those actions are authorized. As one example, Subsections (A), (B), and (E) all identify EPA actions under § 1316. (Subsection (B) accidentally refers to a new-source variance provision that was within a draft of § 1316 but did not make it into the final law.) It is noteworthy that Congress acted with this specificity in the context of a complex statute. "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Longview*, 980 F.2d at 1313. This drafting precision demonstrates that § 1369(b)(1)'s seven subsections should not be read loosely to gobble up provisions that are otherwise absent from that section.

Indeed, a comparison of § 1369(b)(1) to the judicial-review provision in the Clean Air Act confirms that § 1369(b)(1) should be read according to its text. Both Acts have judicial-review provisions cataloging actions that circuits may review, but the Clean Air Act goes further by providing circuit jurisdiction over "*any other* final action of the Administrator." 42 U.S.C. § 7607(b)(1) (emphasis added); *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980). The Clean Water Act contains no similar catch-all. The conclusion to be drawn could not be clearer: Congress knows how to provide for circuit review of all agency action. It did so under the Clean Air Act, but not under the Clean Water Act. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009). This Court must respect that choice.

The Agencies' reading fails to do so. If this Court adopts their "exceptionally expansive view," § 1369(b)(1) could "encompass virtually all EPA actions under the" Act. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015). Take the Agencies' broad reading of "other limitation" "under § 1311" within Subsection (E). They say that the Rule qualifies because § 1311(a) (like many sections) places restrictions on discharges into waters of the United States. Br. in Opp. 13-14. Yet § 1311 references *many* things. This Court, for example, has recognized that it "incorporates" "by reference" § 1313 (the section on state water-quality standards). *PUD No. 1*, 511 U.S. at 713; 33 U.S.C. § 1311(b)(1)(C). But the EPA has repeatedly argued *against* a reading of "other limitation" "under § 1311" that would include its approval or promulgation of the "total maximum daily loads" that are authorized by § 1313. *E.g.*, *Friends of Earth*, 333 F.3d at 187-93. The Agencies

cannot reconcile their *traditional* view that a total maximum daily load is not an "other limitation" "under 1311" with their *current* view that a rule defining waters of the United States is.

The Agencies' reading of "issuing or denying any permit" under Subsection (F) suffers from similar problems. If adopted, it could permit review over actions that Congress intentionally excluded. All agree, for example, that Corps permitting decisions under § 1344 do not fall within Subsection (F). But the Agencies' broad reading of that subsection has allowed them to seek review over the amendments to the Corps' permitting regulations that are at issue here. *E.g.*, 80 Fed. Reg. at 37,115-119.

2. *Rule Against Superfluity.* "It is 'a[nother] cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The circuit courts have applied this principle to § 1369(b)(1). Many courts, for example, have considered whether circuit courts have jurisdiction under Subsection (G)—which covers EPA actions in "promulgating" individual control strategies under § 1314(l)—over an EPA action *approving* a state-promulgated individual control strategy. *E.g.*, *Roll Coater*, 932 F.2d at 670-71. Pointing to Subsection (E), which unlike Subsection (G), *does* use both "approving" and "promulgating," the courts have found jurisdiction lacking based on the rule against superfluity. *Id.* They have refused to write the verb "approving" out of Subsection (E) by reading the verb

"promulgating" in Subsections (E) and (G) broadly to cover both actions. *See id.*

This canon undercuts the Agencies' broad reading of Subsections (E) and (F). As for Subsection (E), a broad reading of "other limitation" "under 1311" would render other language in § 1369(b)(1) superfluous. If, for example, the Rule was issued under § 1311 merely because the phrase "navigable waters" is referenced in that section, Congress had no reason to include "under § 1312" within Subsection (E). That is because the water-quality limitations in § 1312 are likewise referenced in § 1311. 33 U.S.C. § 1311(b)(1)(C). "Thus, if accepted, [the Agencies'] reading would render [Subsection (E)'s] specific reference to section 1312 duplicative and unnecessary." *Friends of the Earth*, 333 F.3d at 190. More generally, a broad reading of "other limitation" "under § 1311" allows that phrase "to swallow up distinctions that Congress made between effluent limitations and other types of EPA regulations" in § 1369(b)(1). *Am. Paper I*, 890 F.2d at 876-77.

As for Subsection (F), the Agencies' argument that issuing or denying a permit under § 1342 extends to regulations that "impact permitting requirements" would render many provisions superfluous. Pet. App. 18a (McKeague, J., op.). Section 1342 mandates that permits "meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343." 33 U.S.C. § 1342(a)(1). So nearly every regulation could affect permitting in some way. Section 1369(b)(1)(C), for example, grants jurisdiction over an action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317" for toxic pollutants. If Subsection

(F) includes all regulations *affecting* permitting, Congress had no reason to adopt this jurisdictional grant for § 1317's toxic-pollutant limitations. Section 1342 *expressly* identifies compliance with § 1317 limitations as a condition for permit issuance, so those § 1317 limitations will, by definition, affect permitting.

C. Background Presumptions For Interpreting Statutes Support The Plain Text

The plain-text reading, lastly, is supported by two background presumptions: (1) that jurisdictional provisions be read to establish clear rules and (2) that statutes be read to permit judicial review over agency action. The Agencies, by contrast, mistakenly invoke a competing presumption in favor of immediate appellate review that does not apply here.

1. This Court's preference for bright-line jurisdictional rules supports a plain-text approach to § 1369(b)(1)

Because § 1369(b)(1) concerns jurisdiction, it should be interpreted as written. The plain text—not the Agencies' "pragmatic" gloss on that text—sets the *clearer* boundary between the jurisdiction of the circuit courts under § 1369(b)(1) and the jurisdiction of the district courts under the APA.

a. "'Jurisdictional rules,'" the Court has noted, "'should be clear.'" *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015) (citation omitted). The Court thus has an established "practice of reading jurisdictional laws, so long as consistent with their language, . . . to establish clear and administrable rules." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567-68 (2016).

This practice is a fixture of the Court's precedent. It has, for example, adopted a clear rule to identify a corporation's "principal place of business" under the diversity-jurisdiction statute (28 U.S.C. § 1332) because "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). It has done the same when interpreting "final decision" under the appellate-jurisdiction statute (28 U.S.C. § 1291), recognizing that "[c]ourts and litigants [were] best served by [its] bright-line rule." *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988). Most famously, the Court has for over a century followed the "well-pleaded complaint rule" under the federal-question-jurisdiction statute (28 U.S.C. § 1331), praising the "clarity and simplicity of that rule." *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

Many reasons justify this approach. To begin with, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz*, 559 U.S. at 94. With vague rules, by contrast, "'an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases.'" *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment) (quoting Zecheriah Chafee, The Thomas M. Cooley Lectures, *Some Problems of Equity* 312 (1950)). These costs "diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz*, 559 U.S. at 94.

Further, "[t]he stakes of the inquiry are high[er]" in the jurisdictional context. *Herr v. U.S. Forest*

Serv., 803 F.3d 809, 813 (6th Cir. 2015) (Sutton, J.). "'[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citation omitted). Thus, "a defect in subject-matter jurisdiction requires a suit's dismissal, no matter how much the parties have spent and no matter how late in the proceedings the defect comes to light." *RTP LLC v. ORIX Real Estate Capital, Inc.*, 827 F.3d 689, 693 (7th Cir. 2016). Not only that, courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514. And they have "no authority to create equitable exceptions to jurisdictional requirements." *Bowels v. Russell*, 551 U.S. 205, 214 (2007). For these reasons, "in matters of jurisdiction," "clarity" "is especially important." *United States v. Sisson*, 399 U.S. 267, 307 (1970).

b. This presumption supports the plain-text reading. Congress, after all, wrote § 1369(b)(1) to establish a "clear and orderly" review process. H.R. Rep. No. 92-911, at 136. And, unlike the Clean Air Act, 42 U.S.C. § 7607(b)(1), the Clean Water Act unambiguously *divides* jurisdiction between circuit courts and district courts. In the range of cases, it will be far easier to determine on which side of this divide an agency action falls if courts stick to § 1369(b)(1)'s text, not the Agencies' amorphous reading of it.

Start with Subsection (E). In most situations, EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" will have clear guideposts. 33 U.S.C. § 1369(b)(1)(E). Most notably, that action will

involve the types of specific restrictions that those four sections direct EPA to impose: technology-based restrictions under § 1311, water-quality restrictions under § 1312, new-source restrictions under § 1316, or sewage-sludge restrictions under § 1345. *See, e.g.*, *E.I. du Pont*, 430 U.S. at 136-37.

Under the Agencies' reading, by contrast, it will often be unclear whether an EPA action that is not itself a restriction under the four sections could have an "*indirect* effect" that should qualify as one. Pet. App. 15a (McKeague, J., op.). That reading could regularly require litigants to guess at a rule's "effects," and compel courts to engage in jurisdictional fact-finding over them. Potential regulations defining "waters of the United States" offer a good example. The relative breadth of a definition could determine whether or not it qualifies as a "limitation" under Subsection (E). If a regulation (like the Rule) broadens the definition to *cover* more waters, according to the Agencies, it would fall within Subsection (E). But if a regulation narrows the definition to *exclude* more waters, it would fall outside Subsection (E) because, under the Agencies' own logic, it would have the effect of "creat[ing] *exemptions* from limitations." Pet. App. 14a (McKeague, J., op.). And what happens if a regulation broadens some aspects of the definition but narrows others? Would litigants have to guess at the regulation's *net* effect? *Cf. id.* at 38a (Griffin, J., concurring in judgment). The Agencies' "indirect-effects" test is simply unworkable.

Turn to Subsection (F). Under the plain text, parties will always know whether they are challenging an EPA action "in issuing or denying [a] permit un-

der section 1342." 33 U.S.C. § 1369(b)(1)(F). The EPA will issue or deny a permit under § 1342.

Under the Agencies' reading, by contrast, parties often will not know whether a rule adequately "relates to" or "affects" the permitting process. *See* Pet. App. 18a (McKeague, J., op.). Indeed, this Court has had great difficulty interpreting statutes, like ERISA, that use language similar to what the Agencies seek to incorporate into Subsection (F). "[A]s many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). The Agencies thus advocate for a vague test that has proved "excruciating for courts to police" in other contexts. *Merrill Lynch*, 136 S. Ct. at 1575.

In sum, the Agencies' views on jurisdiction "jettison[] relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Under their approach, nobody will know where to go with challenges to EPA action. Their reading would regularly force "careful counsel" to sue in both district courts and circuit courts when challenging regulations. *Inv. Co. Inst.*, 551 F.2d at 1280. All of that litigation would "eat[] up time and money" on issues unrelated to the merits, which could represent a costly initial step for those challenging EPA action. *Hertz*, 559 U.S. at 94. Homeowners should not be compelled to "'feel their way'" under the Agencies' ambiguous jurisdictional tests merely to obtain the privilege of "feeling their way" under the Agencies' ambiguous

views on the waters of the United States. *Sackett*, 566 U.S. at 124 (quoting *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring)).

2. The presumption in favor of judicial review of agency action confirms that § 1369(b)(1)'s plain language controls

This Court's presumption that Congress intends to permit judicial review over agency action confirms that courts should stick to § 1369(b)(1)'s text. That is because § 1369(b)(2) *restricts* the judicial review that would be available under the APA for the actions that fall within § 1369(b)(1).

a. "The APA . . . creates a 'presumption favoring judicial review of administrative action.'" *Sackett*, 566 U.S. at 128 (citation omitted). This presumption is a "'strong'" one, and an "agency bears a 'heavy burden'" to overcome it. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted).

The presumption applies, most obviously, when an agency claims that the relevant action is not judicially reviewable *at all*. *See, e.g.*, *id.* at 1652-53. Yet it extends beyond that domain to apply whenever an agency argues that a particular statute *limits* judicial review. In *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), for example, the Agencies argued that the Clean Water Act did not allow for judicial review over their "jurisdictional determination" that certain lands fell within the waters of the United States until the *end* of the permitting process. *Id.* at 1816. The Court disagreed, invoking the presumption of judicial review. *Id.* It reasoned that "'[t]he mere fact' that permitting decisions are

'reviewable should not suffice to support an implication of exclusion as to other[]' agency actions, such as [the jurisdictional determinations]" that were at issue in *Hawkes*. *Id.*; *see Sackett*, 566 U.S. at 129.

b. This presumption supports the plain-text reading here. Section 1369(b)(1) grants judicial review during a short 120-day window, and § 1369(b)(2) bars judicial review of actions that could have been challenged under § 1369(b)(1) in a later "civil or criminal proceeding for enforcement." "Where . . . review is available" under § 1369(b)(1), therefore, "it is the exclusive means of challenging actions covered by the statute." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013).

Given § 1369(b)(2)'s judicial-review limits, this case is the converse of *Hawkes* and *Sackett*. In those cases, this Court rejected the Agencies' arguments that landowners *prematurely* challenged the Agencies' finding that their lands were waters of the United States. In this case, § 1369(b)(2) could permit the Agencies to argue down the road that landowners *belatedly* challenged the Rule as applied to their lands. If the presumption was broad enough to rebut the Agencies' claim that judicial review was *too early* in *Hawkes* and *Sackett*, it is broad enough to rebut their claim that review is *too late* in a future case.

Some circuit courts have thus recognized that the Court's presumption disfavors a broad reading of § 1369(b)(1). The "review-preclusion proviso in § [1369](b)(2)," these courts reasoned, "dissuade[d]" them "from reading § [1369](b)(1) broadly." *Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) ("*Am. Paper II*"). Instead, § 1369(b)(2)'s "peculiar sting" has led them to read § 1369(b)(1) narrowly

by finding EPA actions not clearly indicated in § 1369(b)(1) subject to the general APA standards. *Longview*, 980 F.2d at 1313.

Constitutional concerns strengthen this presumption. Justice Powell, for example, suggested that "constitutional difficulties well may counsel a narrow construction of" the Clean Air Act's review-preclusion proviso. *Harrison*, 446 U.S. at 594-95 (Powell, J., concurring). It was "totally unrealistic," he thought, "to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register." *Adamo Wrecking*, 434 U.S. at 290 (Powell, J., concurring).

These concerns take on greater urgency for general regulations like the Rule that reach ordinary "landowners." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring). If it is "totally unrealistic" to think that "small contractors" would review the Federal Register, *Adamo Wrecking*, 434 U.S. at 290 (Powell, J., concurring), it is downright fanciful to think that the average homeowner would, *see Sackett*, 566 U.S. at 122. Yet "the consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring). And when § 1369(b)(2)'s review-preclusion proviso applies, it has real impact. *E.g.*, *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 754 (5th Cir. 2011); *Nat'l Wildlife Fed'n v. EPA*, 949 F. Supp. 2d 251, 252 (D.D.C. 2013). Thus, the Agencies' broad view of § 1369(b)(1) could effectively overrule *Sackett*.

The plain-text approach, by contrast, lessens these constitutional concerns. Affected parties are

much more likely to have notice of the specific actions that are listed within § 1369(b)(1)—such as the issuance of a particular effluent limitation for a particular industry or the denial of a particular permit to a particular landowner.

c. The lead opinion below rejected this presumption of judicial review, finding the notice concerns "speculative and overblown." Pet. App. 25a (McKeague, J., op.). It initially asserted that the present challenges to "the *validity* of the Rule" would not bar a later "challenge to subsequent *application* of the Rule" to a particular property. *Id.* It is, of course, true that homeowners could challenge the Agencies' finding that their specific lands fell within the Rule as a matter of the proper *interpretation* of the Rule (accepting its *validity*). *Decker*, 133 S. Ct. at 1335. But that misses the point. If the lands squarely fell within the Rule and the homeowners sought to show that the Rule was "'invalid,'" under this Court's cases, *as applied* to those lands, there would be a serious question whether they could present that challenge. *See id.* (citation omitted).

Further, the lead opinion suggested that belated challengers could bring as-applied constitutional challenges to § 1369(b)(2)'s limits on judicial review. Pet. App. 25a (McKeague, J., op.). This flips the presumption of agency-action review and the canon of constitutional avoidance on their heads. Those tools instruct that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). "If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not

those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81. Because the Agencies' broad reading might raise serious problems down the road, the Court should interpret § 1369(b)(1) to avoid those problems *now*.

3. The Agencies mistakenly rely on efficiency concerns and a presumption in favor of immediate appellate review

The Agencies draw support for their "pragmatic" reading from *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), and from concerns with judicial efficiency. *See* Pet. App. 21a-24a (McKeague, J., op.). These arguments, however, cannot support the Agencies' interpretation of Subsections (E) and (F).

To begin with, *Florida Power*, a case about the Atomic Energy Act, does not establish a universal presumption in favor of immediate circuit review similar to this Court's presumptions in favor of bright-line jurisdictional rules and of judicial review over agency actions. This Court has invoked those latter presumptions in many cases over many years. "Nowhere," by comparison, does *Florida Power* even "intimate that it was ruling as a matter of general administrative procedure." *Nader v. EPA*, 859 F.2d 747, 754 (9th Cir. 1988). Instead, *Florida Power* held that jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." *Fla. Power*, 470 U.S. at 746. In this case, therefore, given § 1369(b)(1)'s unambiguous language, a majority of the Sixth Circuit panel correctly rejected the lead opinion's "reliance on [this] non-Clean Water Act case to support its policy arguments." Pet. App. 43a (Griffin, J., concurring in judgment).

In addition, the statute at issue in *Florida Power* did *not* contain anything like § 1369(b)(2)'s "review-preclusion proviso." *Am. Paper II*, 882 F.2d at 289. That proviso should lead this Court to read § 1369(b)(1) narrowly even if it were ambiguous. *Florida Power* relied on efficiency concerns, but the "presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 566 U.S. at 130; *cf. Chrysler Corp. v. EPA*, 600 F.2d 904, 912-13 (D.C. Cir. 1979) (rejecting EPA's reliance on similar efficiency arguments because the relevant jurisdictional provision had a similar review-preclusion proviso).

Finally, the conclusion that district courts should initially review challenges to the Rule does not create a "'perverse situation.'" Br. in Opp. 14 (quoting *E.I. du Pont*, 430 U.S. at 136). To the contrary, there is competing "wisdom" in "allowing difficult issues to mature through full consideration" by different courts. *E.I. du Pont*, 430 U.S. at 135 n.26 (noting that the Court had benefitted from competing opinions by the circuit courts). Indeed, most cases that have reached this Court implicating the scope of "waters of the United States" have involved *as-applied* challenges tied to findings for particular lands. *See Hawkes*, 136 S. Ct. at 1812-13; *Sackett*, 566 U.S. at 123-25; *Rapanos*, 547 U.S. at 729 (plurality op.); *SWANCC*, 531 U.S. at 165. Such further as-applied litigation should not be disallowed simply because the Agencies have now adopted a broad regulation on the scope of "waters of the United States."

Regardless, § 1369(b)(1)'s plain language shows the choice that *Congress* made between these competing policy views. It authorized immediate circuit

review only for seven listed EPA actions. But, unlike in the Clean Air Act, Congress required litigants to follow the normal method of judicial review starting in the district courts for everything else—including the Rule. This case should begin—and end—with that plain text.

CONCLUSION

This Court should reverse the Sixth Circuit's holding that it has subject-matter jurisdiction under 33 U.S.C. § 1369(b)(1) over the petitions for review.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
PETER T. REED
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Respondent
State of Ohio

APRIL 2017

ADDITIONAL COUNSEL

STEVEN T. MARSHALL
Attorney General
State of Alabama

JAHNA LINDEMUTH
Attorney General
State of Alaska

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CYNTHIA H. COFFMAN
Attorney General
State of Colorado

PAMELA JO BONDI
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

CURTIS T. HILL, JR.
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

ANDY BESHEAR
Attorney General
State of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

BILL SCHUETTE
Attorney General
State of Michigan

JIM HOOD
Attorney General
State of Mississippi

JOSHUA D. HAWLEY
Attorney General
State of Missouri

TIM FOX
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

ADAM PAUL LAXALT
Attorney General
State of Nevada

LARA KATZ
Assistant General
Counsel
New Mexico
Environment
Department

GREGORY C. RIDGLEY
Ceneral Counsel
MATTHIAS SAYER
Special Counsel
New Mexico State
Engineer

WAYNE STENEHJEM
Attorney General
State of North Dakota

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

HERBERT H. SLATERY III
Attorney General
and Reporter
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia

BRAD D. SCHIMEL
Attorney General
State of Wisconsin

PETER K. MICHAEL
Attorney General
State of Wyoming

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IN THE

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NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER

Kristy A. N. Bulleit
Counsel of Record
ANDREW J. TURNER
KARMA B. BROWN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20037
kbulleit@hunton.com
(202) 955-1500
Counsel for Respondent Utility Water Act Group

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QUESTION PRESENTED

The question presented is whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.

CORPORATE DISCLOSURE STATEMENT

The Utility Water Act Group ("UWAG") is an ad hoc, non-profit, unincorporated group composed of individual electric utilities and national trade associations of electric utilities. UWAG's purpose is to participate on behalf of its members in rulemakings under the Clean Water Act and in litigation arising from those rulemakings. UWAG is not a parent, subsidiary, or affiliate of any corporation or other entity that has any outstanding securities in the hands of the public, and no publicly-held company has a 10% or greater ownership interest in UWAG.

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STATEMENT OF THE CASE

This case presents a recurring question crucial to determining the proper forum for judicial review of Clean Water Act ("CWA") regulations. The challenged rule ("WOTUS Rule" or "Rule"), jointly issued by the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (together, "Agencies"), interprets a key statutory term–"the waters of the United States"–that establishes the geographic scope of the Agencies' jurisdiction for all CWA regulatory programs.

The Agencies' definition of "the waters of the United States" has considerable regulatory consequences for a wide range of industry activities, and its impacts on Utility Water Act Group ("UWAG")[1] member company facilities and activities is enormous. UWAG members operate a range of facilities

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[1] UWAG is a voluntary, ad hoc, non-profit, unincorporated group of 163 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. UWAG's purpose is to participate on behalf of its members in federal agency proceedings under the CWA, and in litigation arising from those proceedings. UWAG members own and operate many types of electric generating facilities, including steam electric power plants, combustion turbines, and hydroelectric facilities, and an increasing array of renewable generation sites, including wind and solar facilities, as well as electric transmission and distribution lines, natural gas and oil distribution lines, and railroad tracks, all of which are critical to meet the energy needs of our country.

that produce, transmit, and distribute electricity nationwide, and each is affected by the Rule in a unique and significant way.

As a result of the Rule, UWAG members' facilities and activities would be newly subject to CWA regulatory jurisdiction for activities on or affecting lands or waters not previously defined as jurisdictional. For example, UWAG members would be required to obtain Corps-issued CWA § 404 permits for discharges of dredged or fill material, or EPA- or State-issued permits under the CWA § 402 National Pollutant Discharge Elimination System ("NPDES") for discharges of other pollutants, to areas not previously deemed to be "waters of the United States." The Rule also triggers new Spill Prevention, Control, and Countermeasure requirements and other CWA § 311 requirements for UWAG members with respect to such newly identified jurisdictional areas.

Thus, UWAG and its members have a significant interest in ensuring that judicial review of the WOTUS Rule occurs in a manner that allows a full opportunity to address the broad impacts and implications of the Rule for all of these programs, and that does not foreclose later judicial review. Treating the WOTUS Rule as one of the discrete actions subject to the consolidated and exclusive appellate review with the condensed deadlines and preclusive effects that § 509(b)(1) requires would prevent the type of review that is critical for such a sweeping and important rule.

Moreover, the significance of this Court's determination regarding the applicability of § 509(b)(1) to a rule defining the geographic scope of federal CWA jurisdiction has implications that transcend the 2015 WOTUS Rule and will likely affect countless future CWA rulemakings. UWAG has experience with a panoply of CWA rulemakings and litigation. The lack of clarity across and within circuits on the threshold issue of jurisdiction over CWA actions has resulted in confusion, inefficiency, and a waste of judicial resources.[2] The Court's determination on where jurisdiction lies for challenges to the WOTUS Rule will guide federal courts in their future application of § 509(b)(1) for other CWA rulemakings, including–but not limited to–future rulemakings to define "the waters of the United States."

I. Statutory Background

The CWA is a comprehensive statute that partners all levels of federal, state, and local government and deploys a number of programs–both regulatory and non-regulatory–to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits the "discharge of any pollutant" into "navigable

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[2] Indeed, while this case has been pending, the applicability of § 509(b)(1) has caused similar confusion and inefficiency for recent challenges to EPA's denial of petitions for expanded CWA stormwater permitting in Los Angeles and Maryland under EPA's "residual designation authority." See *Blue Water Baltimore, Inc.* v. *Pruitt*, No. 17-1258 (4th Cir. filed Feb. 28, 2017); *Los Angeles Waterkeeper* v. *Pruitt*, No. 17-70570 (9th Cir. filed Feb. 27, 2017).

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waters" except in compliance with specified provisions of the statute, including those requiring a permit. *Id.* §§ 1311(a), 1362(12). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

EPA and States with delegated authority issue NPDES permits under 33 U.S.C. § 1342, which authorize and control discharges of pollutants into waters of the United States. NPDES permits must ensure compliance with a variety of effluent limitations and other limitations, including, *inter alia*, requirements promulgated or approved by EPA under 33 U.S.C. §§ 1311 (effluent limitations guidelines), 1312 (water quality limitations), 1316 (new source performance standards), 1317 (toxic standards), and 1345 (limitations for disposal or use of sewage sludge).

EPA's administration of the NPDES program is not the only method Congress established to meet the goals of the Act. The Act authorized billions of dollars in federal assistance for the construction of municipal sewage treatment plants to end a principal cause of water pollution–the discharge of raw sewage into our Nation's waterways. *Id.* § 1281. The Act also includes separate programs for "nonpoint sources" of pollution, *id.* § 1329, and a host of other research and pollutant-specific programs.

Of particular importance for the WOTUS Rule, which was jointly issued by EPA and the Corps to amend regulations that separately implement each of the Agencies' individual CWA regulatory programs, is the regulation of discharges of dredged or

fill material administered by the Corps, *id.* § 1344. EPA is thus only one of the federal agencies charged with administering the CWA. Other federal agencies, such as the Corps and the U.S. Coast Guard, also have significant and independent responsibilities under the Act, as do the States.

Of the many actions States, EPA, the Corps, and the U.S. Coast Guard are empowered to take, CWA § 509(b)(1) provides the courts of appeals with original jurisdiction over only actions performed by the *EPA Administrator* and, of those, over only seven categories of EPA action. 33 U.S.C. § 1369(b)(1). The EPA actions subject to review under § 509(b)(1) include "approving or promulgating any effluent limitation or other limitation under [CWA §§ 301, 302, 306, or 405]," *id.* § 1369(b)(1)(E), and actions "issuing or denying any permit under [CWA § 402]." *Id.* § 1369(b)(1)(F).

Section 509(b)(1), 33 U.S.C. § 1369 (b)(1), sets a 120-day statute of limitations for petitions seeking judicial review; 28 U.S.C. § 2112(a)(3) provides for consolidation of such petitions; and § 509(b)(2), 33 U.S.C. § 1369(b)(2), precludes later review in civil or criminal proceedings of any EPA action reviewable under § 509(b)(1). Thus, any party who wishes to challenge one of EPA's actions subject to § 509(b)(1) must file that challenge within 120 days of publication of the final action, will face consolidation of that action with other challenges (thus substantially limiting that party's ability to present its own claims), and will face claim preclusion after final review of the petitions.

II. WOTUS Rulemaking

On June 29, 2015, EPA and the Corps finalized a rule that purports to "clarif[y] the scope of 'waters of the United States'" for purposes of all CWA programs. Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015). The WOTUS Rule identifies broad categories of waters that are subject to CWA jurisdiction by rule, narrow categories of waters that are not subject to CWA jurisdiction, and two categories of isolated waters that may be jurisdictional if a site-specific analysis determines that they possess a "significant nexus" to certain types of jurisdictional waters. *Id.* at 37,104-06.

Waters subject to CWA jurisdiction by rule include: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of waters of the United States, (5) certain tributaries, and (6) waters "adjacent" to the waters in the preceding five categories. 33 C.F.R. § 328.3(a).

Waters excluded from federal regulatory jurisdiction include waste treatment systems, prior converted cropland, certain drainage ditches, artificially irrigated areas, swimming or reflecting pools, ornamental waters, artificial lakes and ponds, farm and stock watering ponds, cooling ponds, settling basins, water-filled depressions incidental to mining or construction activity, puddles, subsurface drainage systems, stormwater control features, and certain wastewater recycling structures. *Id.* § 328.3(b).

Waters that are subject to jurisdiction based on a case-specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea; and (B) waters, any part of which are within 4,000 feet of the ordinary high water mark of any of those jurisdictional waters, any impoundment of jurisdictional waters, or any covered tributary. *Id.* § 328.3(a)(8).

III. Challenges to the Final WOTUS Rule

Immediately following the Agencies' publication of the WOTUS Rule, numerous interested parties, including 53 environmental and industrial organizations and 31 States, filed complaints challenging the validity of the rule in multiple federal district courts[3] and (often protective) petitions for review in federal appellate courts.[4]

UWAG protectively filed its original petition in the U.S. Court of Appeals for the Fifth Circuit. The Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 2112(a)(3), consolidated UWAG's petition, along with twelve other petitions for review in eight different courts of appeals, and transferred

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[3] District of Arizona, Northern District of California, District of the District of Columbia, Northern District of Florida, Northern and Southern Districts of Georgia, District of Minnesota, District of North Dakota, Southern District of Ohio, Northern District of Oklahoma, Southern District of Texas, Western District of Washington, Northern District of West Virginia.

[4] Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

them to the Sixth Circuit. Consolidation Order, *In re EPA*, MCP No. 135 (J.P.M.L. July 28, 2015), ECF No. 3.

In response to petitioners' motions for a preliminary stay of the Rule, the Sixth Circuit, on October 9, 2015, granted a motion to stay the WOTUS Rule nationwide, pending a determination regarding whether the "litigation is properly pursued in [the Sixth Circuit] or in the district courts." *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015).

On February 22, 2016, the Sixth Circuit issued a fractured decision with respect to whether it has jurisdiction to review the WOTUS Rule under § 509.[5] The court concluded that it had exclusive jurisdiction to decide the challenges to the WOTUS Rule. *In re U.S. Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016), *cert. granted sub nom. Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 137 S. Ct. 811 (2017). Judge McKeague found that the WOTUS Rule is subject to circuit court review under both CWA § 509(b)(1)(E) (review of EPA action approving or promulgating any effluent limitation or other limitation under 33 U.S.C. §§ 1311, 1312, 1316, or 1345) and (F) (review of EPA action in issuing or denying any permit under 33 U.S.C. § 1342). *Id.* at 266-74. Judge Griffin found that the WOTUS Rule is

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[5] Following the Sixth Circuit's decision, the U.S. District Court for the Northern District of Oklahoma and the U.S. District Court for the District of Minnesota declined jurisdiction. *Oklahoma ex rel. Pruitt* v. *EPA*, No. 15-CV-0381-CVE-FHM, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016); *Wash. Cattlemen's Ass'n* v. *EPA*, No. 15-3058 (DWF/LIB), 2016 WL 6645765 (D. Minn. Nov. 8, 2016).

not an "effluent limitation or other limitation" under § 509(b)(1)(E), but concurred that the circuit courts have jurisdiction over the WOTUS Rule under § 509(b)(1)(F) (review of EPA action in issuing or denying any permit under 33 U.S.C. § 1342) only because he determined that the panel was bound by prior Sixth Circuit precedent, *National Cotton Council* v. *EPA*, 553 F.3d 927 (6th Cir. 2009). *Id.* at 275 (Griffin, J., concurring) Judge Griffin dedicated his opinion to explaining why *National Cotton Council* was incorrectly decided and why § 509(b)(1)(F) should not apply because the WOTUS Rule is not an action issuing or denying a permit under 33 U.S.C. § 1342. Judge Keith dissented, joining Judge Griffin in finding § 509(b)(1)(E) inapplicable, and concluding that *National Cotton Council* does not require a finding that the WOTUS Rule is subject to circuit court review under § 509(b)(1)(F). *Id.* at 283-84 (Keith, J., dissenting).

UWAG, along with other petitioners, filed a petition for rehearing *en banc*. The Sixth Circuit denied rehearing and set a briefing schedule on the merits. Order, *In re U.S. Dep't of Def.*, No. 15-3751 (6th Cir. filed Apr. 21, 2016), ECF No. 92-1; Case Management Order No. 2, *In re U.S. Dep't of Def.*, No. 15-3751 (6th Cir. June 14, 2016), ECF No. 99-1. On September 2, 2016, the National Association of Manufacturers ("NAM") filed a petition for writ of certiorari seeking Supreme Court review of the Sixth Circuit's decision that it has original jurisdiction over challenges to the WOTUS Rule. UWAG joined a Respondent brief in support of NAM, filed October 7,

2016, and on January 13, 2017, the Supreme Court granted certiorari. *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 137 S. Ct. 811 (2017).

SUMMARY OF ARGUMENT

Section 509(b)(1) provides for immediate circuit court review for a specific set of discrete EPA actions. In light of the precise language used by Congress in that provision, as well as the "peculiar sting" associated with the stringent limitations Congress placed on review of those specific categories of EPA actions subject to § 509(b)–namely, direct circuit court review, the potentially preclusive effect of that review, and the 120-day window within which to bring challenges–courts have counseled against the expansive application of § 509(b)(1). Indeed, given the context and structure of § 509(b)(1), district court review is particularly appropriate for the WOTUS Rule, a joint rule of broad applicability that establishes geographic CWA jurisdiction for all CWA regulatory programs.

Moreover, limiting the WOTUS Rule to direct circuit court review under § 509(b)(1) would raise significant due process concerns. A landowner can have certainty that a particular land or water feature is or is not a "water of the United States" only if he or she seeks a jurisdictional determination or permit from the Agencies. Because the exact scope and applicability of the WOTUS Rule will not become clear without facts regarding a particular feature at issue and the Agencies' interpretation of the applicability of the Rule to that feature, potentially regulated par-

ties have no particularized notice that an area on their site could be subject to the Rule.

Accordingly, this Court should reverse the judgment of the Court of Appeals, and hold that the WOTUS Rule is not subject to § 509(b)(1) and must be challenged in the district courts.

ARGUMENT

EPA and the Corps issued a joint rule defining the pivotal phrase "the waters of the United States" on which CWA jurisdiction turns. The Rule does not fall within any of the seven narrowly drawn categories of EPA action that CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1), commits to the circuit courts for review. Rather, jurisdiction to review the validity of the Rule rests exclusively in the district courts.

In support of the petition, the States and Petitioner provided detailed analyses of § 509(b)(1), which we join. Those analyses demonstrate that neither § 509(b)(1)(E) nor (F) applies to the WOTUS Rule. UWAG adopts in full the States' and NAM's arguments, and does not repeat them here.[6]

In light of the considerable regulatory consequences that the applicability of § 509(b)(1) to a variety of CWA actions has for UWAG members, UWAG

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[6] The Sixth Circuit held that the WOTUS Rule was not an "effluent or other limitation," so although review of § 509(b)(1)(E) is not necessarily part of the question presented here, the States and Petitioner have demonstrated that provision would not provide circuit court jurisdiction over the WOTUS Rule.

writes this separate brief to provide its singular perspective on why jurisdiction to review the WOTUS Rule properly lies in the district courts.

I. District Court Review of the WOTUS Rule Is Appropriate Given the Context and Structure of § 509(b)(1).

Section 509(b)(1) creates an exception to the general rule that agency actions implementing the CWA are reviewable in federal district court. That exception applies only to a specific, enumerated set of discrete EPA actions that comprise a narrow slice of the overall CWA framework. Congress adopted § 509(b)(1) to "establish a clear and orderly process for judicial review" of those EPA actions to which it applies, and was careful to explain that "the inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law." H.R. Rep. No. 92-911, at 136 (1972), *reprinted in* S. Comm. on Public Works, 93d Cong., 1st Sess., 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 753, 823 (1973).

Consistent with this Congressional intent, courts have recognized that the specificity of § 509(b)(1)'s plain language demonstrates that agency actions not clearly falling within the certain, limited categories of § 509(b)(1) are not subject to original review in the courts of appeals. *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("The specificity and precision of [§ 509], and the sense of it, persuade us that it is designed to exclude" EPA actions that

Congress did not specify.); *Friends of the Earth* v. *EPA*, 333 F.3d 184, 193 (D.C. Cir. 2003).

Moreover, in light of § 509(b)(2)'s restriction that actions subject to circuit court review under § 509(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement," 33 U.S.C. § 1369(b)(2)–which could be asserted by the Agencies to foreclose jurisdiction over as-applied challenges that raise issues for which review could have been sought within 120 days of promulgation–the Ninth Circuit has noted that reviewability under § 509(b)(1) "carries a peculiar sting." *Longview Fibre Co.*, 980 F.2d at 1313.

Given the precise language of § 509(b)(1) and the "peculiar sting" of its application, courts have "'counseled against [its] expansive application.'" *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1015 (9th Cir. 2008) (quoting *League of Wilderness Defs./Blue Mountains Biodiversity Project* v. *Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002)).

In light of the structure and context of § 509(b)(1), it is appropriate that Congress provided for direct circuit court review of only seven specific categories of EPA actions in § 509(b)(1). Those specific EPA actions are discrete, and are of a nature that Congress's choice to direct appellate review with preclusive effects stands to reason. The enumerated EPA actions include actions "in approving or promulgating any effluent limitation or other limitation" under CWA sections 301, 302, 306, or 405, § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), and EPA actions in "issu-

ing or denying any permit under section 1342," § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F). For each of these categories of EPA action, it is clear who is regulated, and each regulated party or category of parties has clear and specific notice of the limits, restrictions, and/or standards to which they are subject, or the authorizations they have or have not received. For that narrow category of enumerated EPA actions, the action and its import are relatively precise, and additional factual development or analysis is not necessary to determine applicability. Accordingly, Congress appropriately determined that one-time, immediate circuit court review is adequate for such actions.

Conversely, in light of § 509(b)(1)'s structure and context, it is equally evident that § 509(b)(1) is inapplicable to the WOTUS Rule. The Rule interprets a keystone statutory term that applies broadly to all CWA regulatory programs. 80 Fed. Reg. at 37,054, 37,102. It neither narrowly restricts discharges or other activities, nor determines whether or on what terms EPA may issue a permit. Rather, it broadly determines where the Act applies. It is a statutory predicate to needing any permit, not the issuance or denial of a permit. And it is a predicate determined by Congress, not EPA.

Whether the Rule's definition of "the waters of the United States" applies to a specific water feature depends on the facts and characteristics of that fea-

ture.[7] As such, review of the joint Corps and EPA WOTUS Rule is proper in the district courts–where all of the case law addressing the key CWA term "the waters of the United States" has originated.

It would be inappropriate to ignore Congress's carefully crafted provisions in § 509 simply to further judicial efficiency. In fact, during the 1977 CWA amendment discussions, when Congress considered selecting the D.C. Circuit as the appropriate venue for review of all § 509(b)(1) actions, many members spoke out against such centralization and argued that the CWA's judicial provision should not "dictate uniformity" or "destroy the diversity of the judicial system." 123 Cong. Rec. 26,759-60 (Aug. 4, 1977) (statement of Sen. McClure). Extending § 509(b)(1) jurisdiction to encompass the key jurisdictional definition in the WOTUS Rule, in order to avoid multiple district court rulings, would have the very effect Congress sought to avoid.

The federal judicial system is well equipped to handle consideration of complex legal issues by multiple district courts. Often, the views of multiple courts are important for developing and considering different views, and ensuring the well-informed development of the law. See *Hart* v. *Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001). Moreover, it is

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[7] As Judge Griffin pointed out, to interpret a definitional rule like the WOTUS Rule to be subject to one-time circuit court review under § 509(b)(1)(F) would essentially require § 509(b)(1) review of *all* CWA rules. *In re U.S. Dep't of Def.*, 817 F.3d at 282 (Griffin, J., concurring).

common for district courts to review regulations of broad applicability. See, *e.g.*, *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012) (review of water transfer rule proper in district court); *Chem. Mfrs. Ass'n* v. *EPA*, 870 F.2d 177, 265-66 (5th Cir. 1989) (EPA decision to reserve certain pollutants for future technology-based rulemaking held reviewable only in a district court).

Review of the WOTUS Rule, which broadly establishes geographic CWA jurisdiction for all CWA programs, is appropriate in district court. To hold otherwise would ignore the context and structure of the statute, and would sidestep Congress's division of jurisdiction between the courts.

II. Limiting the WOTUS Rule to One-Time Circuit Court Review Would Raise Significant Concerns for Potentially Regulated Parties.

The WOTUS Rule is different from the narrow list of EPA actions subject to circuit court review under § 509(b)(1) because it establishes geographic CWA jurisdiction for all CWA programs. As Justices Kennedy, Thomas, and Alito have noted, "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring); see also *Sackett* v. *EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). As such, the need to avoid the serious due process issues and other "crushing" consequences that would result if

§ 509(b)(1) is held to apply to the WOTUS Rule outweighs any concerns that judicial inefficiency or chaos may result from review of the WOTUS Rule in multiple district courts.

As noted above, the applicability–or not–of § 509(b)(1) is of critical importance because, if the Rule is deemed to fall under § 509(b)(1), any party seeking to challenge the Rule must file its petition in the court of appeals within 120 days after the promulgation of the rule, or after 120 days "only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). A party that does not file a petition for review within that time period may be barred from later challenging review of the rule.[8] In addition to the 120-day statute of limitations, § 509(b)(2) adds a further restriction, which could be asserted by the Agencies to foreclose jurisdiction over as-applied challenges that raise is-

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[8] At least one circuit, applying essentially the same limitation in § 113(a) of the Comprehensive Environmental Response, Compensation and Liability Act, has held that petitions to review actions subject to such a provision must be brought within the prescribed time period even if those potentially affected are uncertain whether the issues raised are ripe for review. *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985). The court noted that "[P]etitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred." *Id.* at 909.

sues for which review could have been sought within 120 days of promulgation. *Id.* § 1369(b)(2).[9]

Section 509(b)'s "peculiar sting," as the Ninth Circuit has called it, would apply with even greater force here because the challenged rule has broad applicability and purports to define the scope of CWA jurisdiction. The WOTUS Rule affords no particularized notice that a landowner's site is subject to the rule, and it provides no specific record and/or basis for reviewing whether the Rule's definition of "the waters of the United States" applies to a particular water feature. The terminology used to define each of the WOTUS Rule's categories of jurisdictional waters and exclusions is ambiguous and subject to varying potential interpretations as applied to particular water features. The Rule is distinct from the enumerated EPA actions subject to circuit court review under § 509(b)(1) because, without facts regarding the water feature at issue and the Agencies' interpretation regarding whether the Rule supports assertion of CWA jurisdiction over that feature (*i.e.*, through a jurisdictional determination ("JD") or permit received from the Corps or EPA), the Rule's impact is unclear. If circuit court review of the Rule is mandated, a landowner or project proponent who may have no knowledge of how the Rule would apply to that land or project could be barred from judicial review. Such a result would be particularly inappro-

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[9] By contrast, APA challenges are subject to a six-year statute of limitations, 28 U.S.C. § 2401(a), and that limitation does not preclude later as-applied challenges to a rule.

priate because CWA jurisdiction will remain uncertain in many places until the Agencies actually apply the Rule.

Foreclosing later challenges to the WOTUS Rule would violate basic due process principles: "Informed by basic principles of due process, it is a cardinal rule of administrative law that a regulated party must be given fair warning of what conduct is prohibited or required of it." *Wis. Res. Prot. Council* v. *Flambeau Mining Co.*, 727 F.3d 700, 707 (7th Cir. 2013) (internal quotation marks omitted). The D.C. Circuit has explained that "[i]n the absence of notice–for example, where the regulation is not sufficiently clear to warn a party about what is expected of it–an agency may not deprive a party of property by imposing civil or criminal liability." *Gen. Elec. Co.* v. *EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). In determining whether a party received fair notice, courts frequently look to the regulations and other agency guidance to determine whether "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform . . . ." *Howmet Corp.* v. *EPA*, 614 F.3d 544, 553-54 (D.C. Cir. 2010).

The threat of foreclosing future judicial review is severe because the CWA is a strict liability statute. It *prohibits* all non-permitted "discharges" into statutory "navigable waters." 33 U.S.C. § 1311. Violations are subject to civil and criminal penalties of up to $51,470 per day per violation, and imprisonment for up to three years. 33 U.S.C. § 1319(c)(2), (d); 81

Fed. Reg. 43,091, 43,095 (July 1, 2016). The WOTUS Rule leaves certain boundaries of CWA jurisdiction uncertain, and subject to case-by-case judgment by the Agencies. Today, without a formal determination regarding the presence or absence of waters of the United States on a particular parcel, a landowner or project proponent may not know whether a proposed activity is subject to the CWA.[10]

If § 509(b)(1) is broadly interpreted to require one-time circuit court review of the WOTUS Rule, the Rule could be enforced against private parties who may face the argument that they are precluded from challenging the validity of the Rule due to a failure to seek immediate review. "The nagging presence of a substantial due process question indicates, . . . at the very least, the propriety of a narrow interpretation of" the jurisdictional statute. *Chrysler Corp.* v. *EPA*, 600 F.2d 904, 913 (D.C. Cir. 1979).

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[10] For the CWA § 404 program, a Corps determination may be sought to establish whether a particular parcel of land contains jurisdictional waters, and if so, where those waters begin and end. 33 C.F.R. § 320.1(a)(6). But there is no analogous process for obtaining determinations regarding the presence or absence of waters of the United States for other CWA regulatory programs. And the Corps has previously stated that the Corps' JD process cannot be used to determine the presence of waters of the United States for the purpose of other CWA regulatory programs. U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf. Even for instances where landowners can seek jurisdictional determinations for their parcels, the Corps' JD process often takes longer than the 120-day window provided by § 509(b)(2).

There is no question that a whole host of parties will now be subject to regulation where they were previously excluded. But the exact scope of the Rule and its application may not become clear for some time. Precluding later judicial review would deny those parties of their significant due process rights and could have "crushing" consequences.

Addressing the myriad aspects and implications of the Rule can be achieved only by review in the district courts. Indeed, the need to understand whether a particular area is a "water of the United States" is at the very heart of many permitting challenges and enforcement actions that arise in the district courts. See, *e.g.*, *Sackett* v. *EPA*, 566 U.S. 120 (2012); *Precon Dev. Corp.* v. *U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011).

In light of these significant concerns, the WOTUS Rule is distinguishable from the narrow list of EPA actions subject to circuit court review under § 509(b)(1), and the importance of district court review for a rule of this type outweighs any concerns regarding the inconvenience or chaos that may result from review of the WOTUS Rule in multiple district courts.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

April 27, 2017

Respectfully submitted,

Kristy A. N. Bulleit
Counsel of Record
ANDREW J. TURNER
KARMA B. BROWN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
kbulleit@hunton.com
(202) 955-1500
Counsel for Respondent
Utility Water Act Group

RECORD AND BRIEFS

No. 16-299

FILED APR 27 2017

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN SUPPORT OF PETITIONER ON BEHALF OF WATERKEEPER ALLIANCE, INC., CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR FOOD SAFETY, HUMBOLDT BAYKEEPER, RUSSIAN RIVERKEEPER, MONTEREY COASTKEEPER, SNAKE RIVER WATERKEEPER, INC., UPPER MISSOURI WATERKEEPER, INC., TURTLE ISLAND RESTORATION NETWORK, INC., SIERRA CLUB AND PUGET SOUNDKEEPER ALLIANCE

JENNIFER C. CHAVEZ
EARTHJUSTICE
1625 Massachusetts Av. NW
Suite 702
Washington, DC 20036
(202) 667-4500
jchavez@earthjustice.org

ALLISON M. LAPLANTE
Counsel of Record
JAMES N. SAUL
EARTHRISE LAW CENTER
LEWIS & CLARK LAW SCHOOL
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 768-6894 (LaPlante)
(503) 768-6929 (Saul)
laplante@lclark.edu
saul@lclark.edu

Counsel for Respondents

April 27, 2017

Alderson Reporting Co., Inc. – (202) 789-0096 – Washington, D. C. 20002

QUESTION PRESENTED

Whether 33 U.S.C. 1369(b)(1)(F), which provides for direct review in the courts of appeals of any action of the EPA Administrator "in issuing or denying any permit under section 1342" of the Clean Water Act, grants the circuit courts of appeals exclusive jurisdiction to review a federal rule defining the phrase "waters of the United States."

PARTIES TO THE PROCEEDING

An original twelve petitions for review of the Clean Water Rule were filed in eight different circuits courts of appeals; these petitions were consolidated and transferred to the Sixth Circuit by the United States Judicial Panel on Multidistrict Litigation. (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)). An additional ten petitions for review were filed after that date and also consolidated.

Respondents Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., and Turtle Island Restoration Network, Inc. were petitioners below in No. 15-3837.

Respondents Puget Soundkeeper Alliance and Sierra Club were petitioners below in No. 15-3839.

Petitioner here, National Association of Manufacturers, was an intervenor-respondent in many of the petitions for review filed below.

Federal respondents here, and respondents below, are the U.S. Environmental Protection Agency; Scott Pruitt, in his official capacity as Administrator of the Environmental Protection

Agency[1]; U.S. Army Corps of Engineers; Robert M. Speer, in his official capacity as Acting Secretary of the Army[2]; and Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army for Civil Works.

The States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia are respondents here, and were intervenor-respondents below.

The other petitioners below, and respondents here, include:

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent

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[1] Administrator Pruitt was sworn in as EPA Administrator on February 17, 2017, and replaces Gina McCarthy as respondent pursuant to Supreme Court Rule 35.3.

[2] Secretary Speer was appointed Acting Secretary of the Army effective January 20, 2017, and replaces John McHugh as respondent pursuant to Supreme Court Rule 35.3.

Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, New Mexico State Engineer.

No. 15-3850: American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc., and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

CORPORATE DISCLOSURE STATEMENT

Respondents Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., Turtle Island Restoration Network, Inc., Sierra Club, and Puget Soundkeeper Alliance are not-for-profit public advocacy organizations that have no parent corporations and do not issue stock.

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OPINIONS BELOW

The decision of the court of appeals is reported at 817 F.3d 261. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. No. 15-3751, Dkt. #92-1. The regulation under review in these consolidated cases is *Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (June 29, 2015).

JURISDICTION

The order and judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of jurisdiction was entered on February 22, 2016. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. On July 1, 2016, Justice Kagan extended the time to file petitions for a writ of certiorari to September 2, 2016, and Petitioner National Association of Manufacturers filed its petition on that date. This Court granted the petition for writ of certiorari on January 13, 2017. The Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 509(b) of the Clean Water Act, 33 U.S.C. 1369(b), are set forth in the appendix to petitioner's petition for writ of certiorari at 53a-54a.

STATEMENT

In order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), the Clean Water Act ("CWA" or "Act") broadly regulates the discharge of pollutants to "navigable waters", which are defined by the Act to mean "the waters of the United States." *Id.* at 1362(7). The meaning of this phrase has broad ramifications for the implementation of nearly every regulatory program under the Act, and so it is perhaps unsurprising that the interpretation of the phrase has engendered considerable controversy since the CWA was enacted in its current form in 1972. See, *e.g.*, *Rapanos* v. *United States*, 547 U.S. 715, 723-729 (2006) (discussing the interpretation of the phrase "waters of the United States" over the years by the Agencies and the courts).

In June of 2015 respondents U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, the "Agencies") promulgated a regulation in an effort to bring clarity and certainty to the scope of the CWA. *Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (June 29, 2015) ("Clean Water Rule" or "Rule"). The Rule constitutes the Agencies' latest effort to define the statutory phrase "waters of the United States," and thereby identify the waters subject to the Act's general prohibition on pollutant discharges, see 33 U.S.C. 1311(a), as well as the regulatory permit

programs under the Act's National Pollutant Discharge Elimination System ("NPDES") and Section 404 of the Act. See generally *id.* at 1342, 1344.

Although the Clean Water Rule codified the Agencies' long-standing application of the Act to several types of non-navigable waters, including certain defined tributaries and their adjacent wetlands, the Rule also created numerous permanent exemptions from CWA jurisdiction for ecologically important waters such as ephemeral streams, waters beyond 4,000 feet from certain other jurisdictional waters, and groundwater. As a result, these waters—potentially consisting of millions of acres of wetlands and thousands of miles of streams, according to the Corps—are left vulnerable to pollution and degradation. For these reasons respondents Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., and Turtle Island Restoration Network, Inc. (collectively, "Waterkeeper") sought review of the Clean Water Rule, as did respondents Puget Soundkeeper Alliance and Sierra Club (collectively, "Puget Soundkeeper").

As relevant here, the CWA provides for direct review in the courts of appeals of any action by the Administrator of the EPA "in issuing or denying any permit under section 1342 of" the Act. 33 U.S.C. 1369(b)(1)(F). This jurisdiction is

both original and exclusive. *Decker* v. *Nw. Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). Petitions for review must be filed within 120 days after the date of the Administrator's action of which review is sought. 33 U.S.C. 1369(b)(1).

Like all petitioners, Waterkeeper and Puget Soundkeeper faced a quandary: Should they seek review of the Clean Water Rule in the court of appeals under Section 1369(b)(1), or should they instead file suit in the district court under the Administrative Procedure Act, 5 U.S.C. 702 *et seq.*? Under the plain language of the statute the answer seems simple enough; on its face the Rule merely defines a statutory phrase, albeit a critically important one. It imposes no effluent limitation or other limitation directly upon any discharger, nor does it issue or deny any permit under Section 1342, which establishes the NPDES permitting program. Yet in light of the muddled case law in some circuits that has expanded the universe of Administrator actions subject to review under 33 U.S.C. 1369(b)(1), as well as the attendant risk that the opportunity for review would be forever extinguished 120 days after promulgation of the Rule, no prudent litigant would make that "either/or" choice.

Waterkeeper timely filed its petition for review under Section 1369(b)(1) in the Ninth Circuit on July 22, 2015, as did Puget Soundkeeper. Ten other petitions for review were filed in the Second, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits; these petitions were ultimately

consolidated and transferred to the Sixth Circuit by the United States Judicial Panel on Multidistrict Litigation. (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)). Ten other later-filed petitions for review were consolidated and transferred to the Sixth Circuit as well.

A month later Waterkeeper filed a complaint against respondents in the United States District Court for the Northern District of California, seeking review of the Clean Water Rule and alleging violations of the Administrative Procedure Act ("APA"), CWA, Endangered Species Act ("ESA"), and National Environmental Policy Act ("NEPA"). *Waterkeeper Alliance et al.* v. *EPA et al.*, No. 15-cv-03927 (N.D. Cal. filed Aug. 27, 2015). Waterkeeper voluntarily dismissed that case in June 2016, only after the Sixth Circuit had determined to proceed under Section 1369(b)(1)(F). Puget Soundkeeper filed a separate complaint in district court, which has been stayed since October 30, 2015. *Puget Soundkeeper Alliance, et al. v. EPA, et al.*, No. 15-cv-1342 (W.D. Wash. filed Aug. 20, 2015).

Over a hundred other parties followed the same two-pronged approach, and thus in addition to the consolidated petitions for review before the Sixth Circuit there were at least twelve suits filed in district courts around the country, all seeking review of the Clean Water Rule. The Judicial Panel on Multidistrict Litigation declined to consolidate these district court actions, see *In re:*

Clean Water Rule, MDL No. 2663, Dkt. 163 (JPML Oct. 13, 2015), and litigation before the Sixth Circuit proceeded concurrently with these district court cases. The result, predictably, was chaos. See generally Nat'l Assn. of Mfrs. ("NAM") Cert. Pet. at 9-14.

Numerous petitioners, including Waterkeeper, moved the Sixth Circuit to dismiss their own petitions. The court denied those motions in a fractured decision, each judge writing only for himself. Judge McKeague wrote the lead opinion, reading Section 1369(b)(1) expansively and holding that direct appellate review of the Clean Water Rule was proper under either Section 1369(b)(1)(E) or (F). *In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016). Judge Griffin joined only in the judgment, believing he was bound to do so by the court's prior decision in *Nat'l Cotton Council of America v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009), yet wrote separately to explain why he believed neither 1369(b)(1)(E) or (F) applies to the Clean Water Rule. *In re U.S. Dep't of Def.*, 817 F.3d at 275-283. Finally, in a dissenting opinion, Judge Keith agreed with the reasoning of Judge Griffin's opinion, but found that *National Cotton Council* does not control the outcome of the jurisdictional question posed in this case. *Id.* at 283-284.

This jurisdictional confusion uniquely affects Waterkeeper, who—alone among the challengers to the Clean Water Rule—contends that the

Agencies violated both the ESA and NEPA when they promulgated the Clean Water Rule. Were it not for the confounding implication of Section 1369(b)(1), Waterkeeper's ESA and NEPA claims would have been properly brought in the district court. See 16 U.S.C. 1540(g)(1)(a) (ESA's citizen suit provision, vesting the district courts with jurisdiction to enjoin "the United States and any other governmental instrumentality or agency" from violating the ESA); *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (explaining how an agency's alleged violations of NEPA are reviewed under Section 10(a) of the APA, 5 U.S.C. 702(a)).

Waterkeeper and Puget Soundkeeper challenge the Clean Water Rule from the opposite end of the spectrum from NAM; Waterkeeper and Puget Soundkeeper allege that the Rule impermissibly abandons CWA jurisdiction over many ecologically valuable waters that have been historically regulated by the Agencies, whereas NAM and its allied challengers argue that the Rule unlawfully expands CWA jurisdiction. See, *e.g.*, Compl. ¶ 3, *Am. Farm Bureau Fed'n et al.* v. *EPA et al.*, No. 15-cv-00165 (S.D. Tex. filed July 2, 2015). But on the limited issue of whether the courts of appeals have jurisdiction over the Rule under Section 1369(b)(1), Waterkeeper and Puget Soundkeeper argue in support of NAM because NAM is correct that these cases belong in the district courts. Those affected by rules promulgated under the CWA—be they environmental advocates seeking to protect our

nation's natural resources, or businesses regulated under the Act's permitting programs—stand to benefit from a plain-text construction of Section 1369(b)(1)(F) that adds certainty to the litigation process and affords the presumptively expansive opportunities for judicial review Congress intended in the APA.

SUMMARY OF THE ARGUMENT

1. The question presented by petitioner is whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead seeks to define the waters that fall within Clean Water Act ("CWA") jurisdiction. The answer to that question is yes. The judgment of the court of appeals should be reversed because Section 1369(b)(1) provides for direct review in the courts of appeals only for explicitly listed actions, none of which encompasses jurisdictional rules. More specifically, the promulgation of a rule seeking to define the waters to which the statute applies simply cannot be deemed the "issu[ance] or den[ial]" of a permit under Section 1342 of the Act. The plain language of the CWA compels this result.

a. Section 1369(b)(1) of the CWA provides for direct review in the courts of appeals for seven specific categories of actions taken by EPA under the statute. On its face, this provision offers no indication that the courts of appeals should have

direct review over unspecified actions. The conclusion that they do not is underscored by the fact that Section 1369(b)(1) specifically mentions the promulgation of rules under several statutory sections, none of which is at issue here. Significantly, it makes no mention of EPA's general rulemaking authority under the Act, 33 U.S.C. 1361(a), which provides the firmest foundation for the Clean Water Rule.

Two other dynamics provide further support for this conclusion. First, Congress could easily have inserted—but did not—a "catch-all" provision for any "final action taken" by the Administrator, as it did in a similar judicial review provision in the Clean Air Act ("CAA"), 42 U.S.C. 7607(b)(1). And second, all of the identified situations in Section 1369(b)(1) reference actions taken solely by EPA; none references either actions taken by the Corps of Engineers or, as here, actions undertaken jointly by both agencies.

b. The Agencies' promulgation of a rule defining the waters to which the CWA applies was not the issuance or denial of an NPDES permit within the meaning of Section 1369(b)(1)(F). Put simply, by its terms Section 1369(b)(1)(F) applies to decisions EPA makes in response to particular permit applications. The Clean Water Rule, by contrast, addresses broad questions regarding the waters to which the statute applies; it does not relate with sufficient particularity to any particular NPDES permit application or decision. Moreover, its effects far

transcend particularized permit decisions, in some instances categorically eliminating any need for a permit application.

Further, by its terms this rule applies well beyond the realm of NPDES permit decisions, however broadly interpreted. Indeed, it defines the waters with respect to which the states must develop water quality standards. And even more pointedly, it does the same for waters subject to the Corps' permit authority under Section 1344, colloquially known as the "Section 404 permit program." It is telling that nothing in Section 1369(b)(1) gives any indication that its judicial-review-channeling dynamics should apply in these contexts. It is also telling that applying Section 1369(b)(1) in the context of Section 1344 would be in tension with the traditional review authority this Court has exercised in wetlands cases.

c. Nothing in either *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), or *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), should alter this analysis. Taken together, this Court's decisions in those cases indicate only that the courts of appeals can hear direct challenges either to EPA actions listed in Section 1369(b)(1) or to other actions having the "precise effect" of listed actions. Neither decision supports the conclusion that Section 1369(b)(1)(F) should be stretched to include actions having nothing to do with specific permit applications.

2. An expansive reading of Section

1369(b)(1)(F) would be in tension with traditional ripeness analysis, would promote excessive and unnecessary litigation, and would pose serious fairness and due process concerns in situations in which entities are foreclosed from challenging the validity of regulations in enforcement cases.

For these reasons, the Court should reverse the judgment of the court of appeals. The Sixth Circuit does not have direct jurisdiction to hear this case.

ARGUMENT

Section 1369(b)(1)(F)'s text plainly does not authorize–let alone compel–direct review in the courts of appeals regarding challenges to rules interpreting the Clean Water Act's ("CWA") jurisdictional reach. This Court's holdings on Section 1369(b)(1) are limited, and do nothing to alter the clear thrust of the statute in this context. For these reasons, and in light of the troubling implications of an expansive reading of Section 1369(b)(1)(F), the Court should determine that the Sixth Circuit did not have original jurisdiction over challenges to the Clean Water Rule.

I. SECTION 1369(b)(1)'S GRANT OF DIRECT JUDICIAL REVIEW IN THE COURTS OF APPEALS IS LIMITED

Section 309(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), is inapplicable to challenges to EPA and Corps rules clarifying the basic jurisdictional

terms established in Sections 1311 and 1362 of the Act. 33 U.S.C. 1311, 1362. Congress expressly enumerated seven EPA Administrator actions[1] subject to Section 1369(b)(1). Section 1369(b)(1) provides for review in the courts of appeals of EPA actions:

> (A) in promulgating any standard of performance under section 1316 of this title,
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
> (F) in issuing or denying any permit under section 1342 of this title, and
> (G) in promulgating any individual control strategy under section 1304(l) of this title
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> * * *

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[1] Hereafter, we refer to both the EPA Administrator and to the agency itself as "EPA."

[2] In the court below, the Government argued that the Clean Water Rule could constitute the promulgation of an "an effluent limitation or other limitation" under Section

33 U.S.C. 1369(b)(1)(A)–(G).

On its face, Section 1369(b)(1) offers no indication that Congress intended the scope of this provision to extend beyond the explicitly listed actions. See, *e.g.*, *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 188 (1978) (applying the maxim *expressio unius est exclusio alterius* to conclude that Congress did not intend to exempt any "hardship cases" from the Endangered Species Act beyond those expressly listed in the statute). Instead, its precision demonstrates that Congress intended Section 1369(b)(1) to apply *only* to the EPA actions listed therein. Indeed, the only logical inference is that Congress intended to *exclude* EPA actions not specifically listed in Section 1369(b)(1). *See Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("[T]he canon *expressio unius est exclusio alterius* . . . has force . . . when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence") (internal quotation omitted).

The conclusion that Section 1369(b)(1) does not encompass unspecified categories of regulations is buttressed by the fact that Section 1369(b)(1) makes specific reference to the "promulgat[ion]" of regulations under several specified statutory sections, 33 U.S.C. 1369(b)(1)(A), (C), (E), and (G), none of which is at

issue here.[2] Significantly, Section 1369(b)(1) makes no reference to rules addressing Section 1311(a), which is the provision of the statute that requires those who "discharge . . . any pollutant" to obtain a permit under either Section 1342 or Section 1344.[3] Nor does it mention either Section

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[2] In the court below, the Government argued that the Clean Water Rule could constitute the promulgation of an "an effluent limitation or other limitation" under Section 1369(b)(1)(E). Two of the three judges on the relevant panel rejected that position. See *In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 276-280 (6th Cir. 2016) (Griffin, J., concurring in the judgment), 283 (Keith, J., dissenting). This makes eminent sense given the fact that, under the Act, effluent limitations by definition relate to dischargers, 33 U.S.C. 1362(11), and that therefore, under the canon of *noscitur a sociiis*, so too should the "other limitation" phrase. Cf. *id.* at 276 (Griffin, J., concurring in judgment and applying *noscitur a sociiis*) ("The Act defines 'effluent limitation' as expressly relating to *discharges*[.]) (emphasis in original). Perhaps for this reason, the Government did not seek *certiorari* regarding this determination.

[3] See 33 U.S.C. 1311(a), referencing 33 U.S.C. 1342 (creating the NPDES permit program) and 1344 (creating a permit program for the discharge of dredged or fill material). See also *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261, 273-275 (2009) (discussing the relationship between the two permitting programs). Section 1369(b)(1)(E) does reference Section 1311, but only with respect to "effluent limitations or other limitations" established thereunder. As this Court recognized in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), the statute contemplates that EPA is to establish effluent limitations pursuant to 33 U.S.C. Section 1311(b), after having first developed effluent limitation guidelines under 33 U.S.C. Section 1314(b). *Id.* at 130-131.

1362(12), which defines that key jurisdictional phrase, or Section 1362(7), which further defines the term "navigable waters" as "the waters of the United States." These are key statutory definitions that delineate the reach of the Act itself.

Even more pointedly, Section 1369(b)(1) makes no mention of Section 1361(a), which provides EPA with its general rulemaking authority under the Act. 33 U.S.C. 1361(a). In the preamble to the final rule, EPA and the Corps cited several statutory provisions as providing the authority for the Clean Water Rule,[4] of which Section 1361(a) is the only one that explicitly authorizes rulemaking with regard to anything other than the development of effluent limitations. If Congress had intended for EPA's promulgation of regulations under Section 1361(a) to be included in Section 1369(b)(1)(F), it would have expressly said so.

Moreover, Congress could readily have included in Section 1369(b)(1) a "catch-all" provision for any "final action taken" by the Administrator, as it did in a similar judicial

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Section 1311(a), by contrast, establishes the basic jurisdictional parameters of the NPDES and Section 404 permit programs, when taken together with the relevant definitional provisions in Section 1362.

[4] 80 Fed. Reg. 37,054, 37,055 (June 29, 2015) (citing 33 U.S.C. 1311, 1314, 1321, 1342, 1344, and 1361 as providing the authority for the Clean Water Rule).

review provision in the Clean Air Act ("CAA"), 42 U.S.C. 7607(b)(1). But it did not.[5] Congress's decision not to do so further demonstrates that it intended for the courts of appeals to have direct review over only the actions listed in Section 1369(b)(1).[6]

Finally, the conclusion that Section 1369(b)(1) should be limited to the expressly-identified circumstances is underscored by the fact that all of the identified situations address actions taken solely by EPA.[7] Not one pertains to a context where, as here, EPA and the Corps have taken joint action under the statute. Indeed, neither the Corps, nor the corresponding term of

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[5] When Congress was amending the Clean Water Act in 1977, Senators Kennedy and Javits proposed an amendment to the bill on the floor of the Senate that would have, among other things, expanded Section 1369(b)(1) to cover any EPA action in "promulgating any regulation issued under section [1311] or [1342]." 123 Cong. Rec. S26,754 (daily ed. Aug. 4, 1977). In the end, however, these amendments were not adopted. H.R. Rep. No. 95-830, at 112 (1977) (Conf. Rep.).

[6] A similar judicial review provision in the Resource Conservation and Recovery Act ("RCRA") also does not include a "catch-all" provision. Courts have interpreted the RCRA provision to include only the actions expressly listed in the statute. *See, e.g., Am. Portland Cement Alliance* v. *EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996).

[7] The statutory term of art used throughout Section 1369 is the "Administrator," which is defined in Section 1251(d) to mean the Administrator of EPA.

art, the "Secretary,"[8] nor Section 1344 itself–the foundation of the Section 404 permit program–is mentioned once in Section 1369(b). Section 1369(b)'s failure to make any reference to the Corps takes on particular resonance given the Corps' lead role in implementing Section 1344, one of the two key permit programs under the Act. The inference is inescapable: Congress intended that direct review in the courts of appeals be limited to a specific list of actions, all of which are taken solely by EPA.

Recognizing Congress's intent to limit Section 1369(b)(1) to the actions expressly enumerated in that section, many courts of appeals have correctly interpreted the provision by staying true to its text. See, *e.g.*, *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513, 517 (2d Cir. 1976) ("[T]he complexity and specificity of [Section 1369](b) in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable."); *Friends of the Earth* v. *EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003) ("We agree with our sister circuits [the 2nd, 5th, 8th, and 11th Circuits]: original jurisdiction over EPA actions not expressly listed in [S]ection 1369(b)(1) lies not with us, but with the district court.").[9] So too

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[8] See 33 U.S.C. 1344(d).

[9] See also *Am. Iron and Steel Inst.* v. *EPA*, 543 F.2d 521, 528 (3d Cir. 1976) (referring to Section 1369(b)(1)(E) and (F) as "explicit and limited provisions"); *Appalachian Energy*

should the analysis here start from the premise that *only those EPA actions precisely listed in Section 1369(b)(1)* are subject to that provision's limitations on judicial review.

Group v. EPA, 33 F.3d 319, 322 (4th Cir. 1994) (rejecting original jurisdiction over an internal EPA memorandum in part because Section 1369(b)(1) limits its jurisdiction to "specified actions of the EPA administrator"); *City of Baton Rouge v. EPA*, 620 F.2d 478, 480 (5th Cir. 1980) ("[T]he rule is clear: the Courts of Appeals have jurisdiction for direct review only of those EPA actions specifically enumerated" in Section 1369); *Ark. Poultry Fed'n v. EPA*, 852 F.2d 324, 325 (8th Cir. 1988) (noting that courts of appeals' original jurisdiction under Section 1369(b)(1)(C) is limited); *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 642 (11th Cir. 1990) (stating that Section 1369 provides for "direct review in a circuit court of appeals of specific administrative actions under the statute"); *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005) ("[S]ince some but not all of the actions that the EPA can take under the CWA are listed with considerable specificity in [S]ection 1369(b), not all EPA actions taken under the CWA are directly reviewable in the courts of appeals.").

II. THE ISSUANCE OF A RULE CLARIFYING THE WATERS TO WHICH THE CLEAN WATER ACT APPLIES DOES NOT CONSTITUTE THE ISSUANCE OR DENIAL OF A PERMIT UNDER SECTION 1342 OF THE STATUTE

A. Under the Plain Language of Section 1369(b)(1)(F), a Rule Defining Which Waters Constitute "Waters of the United States" for Purposes of Establishing Clean Water Act Jurisdiction is not the Issuance or Denial of a Permit Under Section 1342

Section 1369(b)(1)(F) grants the courts of appeals direct review over EPA's action "in issuing or denying any permit under Section 1342" of the CWA. 33 U.S.C. 1369(b)(1)(F). This provision is plainly about the issuance or denial of a particular NPDES permit. See, *e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (finding that Section 1369(b)(1)(F) is limited "to a direct challenge to the merits of a decision to 'issue or deny' a NPDES permit."); *Arkansas* v. *Oklahoma*, 503 U.S. 91, 97 (1992) (assuming without discussion that the court of appeals had original jurisdiction to review EPA's issuance of an NPDES permit).

As Judge Griffin noted below, "[u]nder a plain text reading, the Clean Water Rule neither issues

nor denies a permit under the NPDES." *In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 280 (6th Cir. 2016) (Griffin, J., concurring in the judgment). Instead, the Rule clarifies the waters to which the CWA does and does not apply. Simply put, a rule addressing the jurisdictional reach of the statutory waters of the United States does not relate with sufficient particularity to any specific permit application. We turn again to Judge Griffin:

> At best, the Clean Water Rule is one step removed from the permitting process. It informs whether the Act requires a permit in the first place, not whether the Agencies can (or will) issue or deny a permit.

Id. at 281 (Griffin, J., concurring in the judgment).

In the court below, the Government argued that the Clean Water Rule should be deemed to constitute the "issu[ance] or den[ial]" of a permit merely because it affects permit decisions. *In re U.S. Dept. of Def.*, 817 F.3d at 270-271 (McKeague, J., lead opinion). But this argument glosses over the dissimilarity of the two types of actions. To the extent that the Rule provides regulatory exemptions–as it does, for example, with respect to all seasonal streams not meeting

the new definition of "tributary"[10]–the effect is that dischargers may continue discharging without restriction and without fear of liability under the CWA. This is in no way akin to the issuance of a permit. Under both the statute and EPA's regulations, EPA can only issue permits if they meet specified requirements, including, for example, ensuring compliance with water quality standards. 33 U.S.C. 1311(b)(1)(C), 1342(a)(1) and (2); 40 C.F.R 122.4(d); see also *Arkansas*, 503 U.S. at 105-107 (upholding 40 C.F.R. 122.4(d) even to the extent that it requires compliance with the water quality standards of downstream states). By contrast, a regulatory exemption negates these requirements, *including the permit requirement itself*. A regulatory action that negates the very need for a permit cannot be deemed to be the equivalent of a permit issuance. *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008) ("*NWEA*") (finding that permanent exemptions from the NPDES program are not even "functionally similar" to the issuance of an NPDES permit); *Envtl. Prot. Info. Ctr.* v. *Pac. Lumber Co.*, 266 F. Supp. 2d 1101, 1114 (N.D. Cal. 2003) (noting that the effect of an exemption "is to exclude sources from the NPDES program,

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[10] See, *e.g.*, 80 Fed. Reg. at 37,058. The Clean Water Rule also categorically excludes groundwater, regardless of whether it has a significant hydrological relationship with any nearby surface waters. *Id.* at 37059. *Cf. Idaho Rural Council* v. *Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) (concluding that groundwater may be a "water of the United States" where it has such a relationship).

whereas the issuance or denial of a permit, as a matter of statutory mandate, only occurs when there are point sources regulated by the NPDES program.").[11]

At the other end of the spectrum, in contexts in which the Clean Water Rule constitutes an assertion of regulatory jurisdiction, it similarly cannot be understood to operate in any sense like either a permit issuance or denial. Instead, it merely indicates the situations in which an NPDES permit is required should a person or facility wish to discharge pollutants.[12] As Judge Griffin indicated, it merely sets the stage for an eventual permit decision if the relevant water comes within its terms. *In re U.S. Dept. of Defense*, 817 F.3d at 281 (Griffin, J., concurring in the judgment).

Judge Griffin also identified another textual problem with equating the Clean Water Rule with the issuance or denial of an NPDES permit: it applies across the entire statute, not just under

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[11] See also *Natural Res. Def. Council, Inc.* v. *Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) (noting that even "general permits"–meaning those which are applicable to multiple sources–are different from exemptions because they must be revisited every five years, whereas exemptions "tend[] to be become indefinite[.]) (citing 33 U.S.C. 1342(a)(3), (b)(1)(B).

[12] See 33 U.S.C. 1311(a), 1362(12) (collectively requiring permits for "any addition of any pollutant to navigable waters from any point source").

the NPDES program. *In re U.S. Dept. of Defense*, 817 F.3d at 281 (Griffin, J., concurring in the judgment). The Agencies themselves acknowledged this dynamic in the preamble to the Rule:

> The jurisdictional scope of the CWA is "navigable waters," defined in section [1362(7)] of the statute as "waters of the United States, including the territorial seas." The term "navigable waters" is used in a number of provisions of the CWA, including the . . . [NPDES] program, the section [1344] permit program, the section [1321] oil spill prevention and response program, the water quality standards and total maximum daily load programs (TMDL) under section [1313], and the section [1341] state water quality certification process.

80 Fed. Reg. at 37,055 (footnote omitted). Deeming the Clean Water Rule to constitute the issuance or denial of an NPDES permit would have implications for programs that Congress never intended to be touched by Section 1369(b)(1).

These implications would be particularly stark in the context of the Section 1344 permitting program. As mentioned, the Corps has the lead role under Section 1344. In that capacity, it of course has the implied authority, under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to promulgate rules

resolving ambiguities in any of the relevant statutory provisions. Indeed, it has a long history of defining the phrase here at issue—"the waters of the United States"—culminating in its joint involvement in the Clean Water Rule. See generally *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 183-184 (2001) ("*SWANCC*") (Stevens, J., dissenting) (discussing the pre-Clean Water Rule evolution of the Corps' jurisdictional rules).

As also mentioned, Section 1369(b)(1) gives no indication that it has any bearing on either the Corps or the permit program it administers under Section 1344. Given that silence, it is unsurprising that courts, including this Court, have repeatedly considered the legality of various aspects of the Corps' regulatory definitions of the phrase "waters of the United States" in as-applied challenges, without regard to whether those challenges were untimely under the stringent requirements of Section 1369(b)(1),[13] or were otherwise improperly filed because they were not brought directly in the courts of appeals. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (arising from an enforcement case); *SWANCC*, 531 U.S. 159 (2001) (in which a permit denial was appealed in the district court);

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[13] Section 1369(b)(1) requires that challenges to the "issuance or denial" of a permit be brought within 120 days of such issuance or denial, unless a particular challenge "is based solely on grounds arising after such 120th day."

Rapanos v. *United States*, 547 U.S. 715 (2006) (arising from two separate enforcement cases). Indeed, in none of these cases did the Government even raise Section 1369(b)(1) as a potential barrier to review. This makes sense, given that Section 1369(b) contains no reference to either the Corps or the Section 404 permit program.

If Section 1369(b)(1)(F) is deemed to apply to the Clean Water Rule, however, the Corps will have flipped these jurisdictional dynamics on their head merely by undertaking a joint rulemaking process with EPA. Under the literal terms of Section 1369(b)(1), this case would be the only opportunity that challengers would have to contest the Rule, at least in the absence of new grounds.[11] It seems unlikely, to say the least, that Congress would have intended for the judicial-review dynamics of Corps regulations under the CWA to pivot so radically on the fortuity of whether the Corps happens to regulate in tandem

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[11] See fn. 13, *supra*; see also *Tex. Mun. Power Agency* v. *EPA*, 799 F.2d 173, 175 (5th Cir. 1986) (quoting *Natural Res. Def. Council, Inc.* v. *EPA*, 673 F.2d 400, 406 (D.C. Cir. 1982), *cert. denied sub nom Chem. Mfrs. Ass'n* v. *EPA*, 459 U.S. 879 (1982), for the proposition that those who fail to timely challenge qualifying actions under Section 1369(b)(1) "lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.").

with EPA.[15] The better interpretation is that Section 1369(b)(1)(F) applies only where EPA is taking action in response to specific permit applications.[16]

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[15] Indeed, this Court has assumed the opposite to be the case in *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261 (2009). In that case, EPA and the Corps had issued a joint regulation defining the phrase "fill material," a jurisdictional phrase used in Section 1344. 67 Fed. Reg. 31,129 (2002); 557 U.S. at 275 (citing 40 C.F.R. 232.2). In its brief, the respondent noted that under a literal reading of that rule, the term fill material might encompass materials particularly unsuitable for regulation under Section 1344, such as "feces and uneaten feed." 557 U.S. at 275. In response, this Court noted that such "extreme instances" were not before it. *Id.* Tellingly, it indicated that if such a situation were to arise, the respondents could bring a challenge arguing that "the fill regulation as interpreted is an unreasonable interpretation of [Section 1344]." *Id.* at 276.

[16] Even more bizarrely, if Section 1369(b)(1)(F) applies to EPA rules defining "waters of the United States," the Government could theoretically argue that cases such as *SWANCC* and *Rapanos* have no bearing on its pre-Clean Water Rule regulations defining that phrase, because the statutory time for reviewing EPA's rules—which were (and are) substantively identical to those of the Corps—would have long since passed. Compare, *e.g.*, 40 C.F.R. 122.2 (2012) (EPA), and 33 C.F.R. 328.3(a) (2012) (Corps).

B. Neither *E.I. du Pont* Nor *Crown Simpson* Establishes that Section 1369(b)(1)(F) Extends to EPA Rules Bearing Generally on the NPDES Program

Courts that have broadly construed Section 1369(b)(1) have relied on this Court's decisions in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ("*E.I. du Pont*"), and/or *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) ("*Crown Simpson*"). See, *e.g.*, *Natural Res. Def. Council* v. *EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981) (relying on both in determining that it had original jurisdiction to review certain regulations under Section 1369(b)(1)(E); *Nat'l Cotton Council of America* v. *EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (relying in part on *E.I. du Pont* in deeming that Section 1369(b)(1)(F) provided it with original jurisdiction to consider a regulatory exemption); see also *In re U.S. Dept. of Defense*, 817 F.3d at 270-273 (McKeague, J., lead opinion) (relying on both). But *E.I. du Pont* and *Crown Simpson* reflect narrow holdings appropriately tailored to a narrow statutory provision.

In *E.I. du Pont*, this Court considered whether Section 1369(b)(1) provides the courts of appeals with jurisdiction over challenges to "industry-wide regulations imposing . . . precise [effluent] limitations" on existing dischargers. 430 U.S. at 115. This Court's determination that EPA has the authority to promulgate effluent limitation regulations under Section 301

"necessarily resolve[d]" the jurisdictional question, because the courts of appeals plainly have jurisdiction over such regulations under Section 1369(b)(1)(E). *Id.* at 136. Once this Court found EPA had authority under the Act to promulgate effluent limitations as nationally applicable regulations and not just individual permit conditions, it looked to the plain meaning of Section 1369(b) and easily answered the jurisdictional question. *Id.*

In rejecting the argument that the courts of appeals lack original jurisdiction, this Court did express concern that such an interpretation would result in a "truly perverse situation in which the court of appeals would review the numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont*, 430 U.S. at 136. The "basic regulations" to which this Court was referring were, of course, the *effluent limitations* at issue in the case, which are explicitly reviewable in the courts of appeals pursuant to Section 1369(b)(1)(E). Regulations clarifying the waters to which the Clean Water Act applies are plainly not effluent limitations. And this Court's decision in *E.I. du Pont* should not be expanded beyond its narrow context to support the notion that the language of Section 1369(b)(1)(F) should be contorted to make unspecified actions reviewable in the courts of appeals.

Indeed, in *E.I. du Pont* this Court even recognized the probability that certain EPA actions very much resembling the promulgation of effluent limitations would not themselves be subject to review in the courts of appeals under Section 1369(b)(1): "If industry is correct that the regulations can only be considered [Section 1314] guidelines, suit to review the regulations could probably be brought only in the District Court, if anywhere." 430 U.S. at 125. This is because Section 1314 is not listed in Section 1369(b)(1). The promulgation of binding effluent limitations under Section 1311 and the adoption of Section 1314 effluent limitation guidelines are closely related actions.[17] The link between effluent

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[17] The CWA defines "effluent limitation" as "any restriction . . . on quantities, rates, and concentrations of" pollutants. 33 U.S.C. 1362(11). In contrast, EPA's establishment of "effluent limitation guidelines" constitutes a preliminary step that assists EPA in determining effluent limitations by, for example, "identify[ing] . . . the degree of effluent reduction attainable through the application of the best practicable control technology currently available" and "specify[ing] factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . ." 33 U.S.C. 1314(b)(1)(A)–(B). Thus, EPA's action in "approving or promulgating any effluent limitation" is informed by, but not the same as, EPA's action promulgating regulations providing guidance to the EPA on the setting of effluent limitations. *See, e.g.*, *Waterkeeper Alliance, Inc.* v. *EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (noting that "[t]he specific effluent limitations" at issue in the case "are dictated by the terms of more general 'effluent limitation guidelines' ('ELGs'), which are separately promulgated by the EPA.").

limitations and effluent guidelines is far closer than any connection between the Clean Water Rule and the issuance or denial of a permit under Section 1369(b)(1)(F). But, the point is that this Court resisted the notion that even very closely related actions should be swept into Section 1369(b)(1)'s coverage.

This Court's decision in *Crown Simpson* is similarly inapplicable here. In *Crown Simpson*, this Court found that the courts of appeals had original jurisdiction under Section 1369(b)(1)(F) over EPA's objection to a state-issued NPDES permit because EPA's objection was "functionally similar" to EPA's denial of an NPDES permit. 445 U.S. at 196. As the Ninth Circuit has recognized, *Crown Simpson* adopted a narrow understanding of "functional similarity," only finding that EPA's objection to a state-issued NPDES permit—which at the time[18] had the

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[18] Prior to the Clean Water Act Amendments of 1977, EPA was authorized to object to the issuance of state-issued NPDES permits, "but had no authority to issue a federal permit if the state refused to meet the EPA's objections." *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 871 (7th Cir. 1989). Under this regime, "an EPA objection effectively denied a permit because the objection created an impasse if the state refused to modify its proposed permit." *Id.* at 874 (citing *Crown Simpson*, 445 U.S. at 196). But the CWA now allows EPA to issue the permit itself, 33 U.S.C. 1342(d), a change of circumstance this Court expressly declined to consider in *Crown Simpson* given the timing of the Amendments relative to the permit veto at issue in that case. 445 U.S. at 194, n.2. The fact that Congress addressed

"precise effect" of denying the permit—was "functionally similar" to EPA's denial of a permit. *NWEA*, 537 F.3d at 1016 (citing *Crown Simpson*, 445 U.S. at 196).[19] Given this high degree of similarity, the *Crown Simpson* Court was willing to interpret Section 1369(b)(1)(F) in light of what it perceived to be "the congressional goal of ensuring prompt resolution of challenges to EPA's actions." 445 U.S. at 196.

As the denial of a permit is specifically listed within Section 1369(b)(1), it is wholly unremarkable that the Court would authorize the courts of appeals to review an action that had that "precise effect." As discussed above, in the Clean Water Rule context the Agencies' action of simply clarifying the waters to which the CWA applies does not have the "precise effect," or even close to the same effect, as the issuance or denial of an NPDES permit. Thus, *Crown Simpson* is

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the very quandary this Court was faced with makes *Crown Simpson*'s relevance to this case even more strained. *See Am. Paper*, 890 F.2d at 874 (holding that the 1977 Amendments "fundamentally altered the underpinnings of the *Crown Simpson* decision.").

[19] See also *Nat'l Mining Ass'n* v. *Jackson*, 880 F.Supp.2d 119, 134 (D.D.C. 2012), *rev'd on other grounds sub nom Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014) (finding that an EPA guidance document regarding the issuance of NPDES and Section 404 permits to surface mines was not "functionally similar" to the issuance or denial of an NPDES permit, because even though it "'relates to' the issuance of 402 permits . . . it [did] not amount to an EPA issuance or denial of a 402 permit" (citations omitted)).

not determinative of the instant case.

This Court in both *E.I. du Pont* and *Crown Simpson* found that the courts of appeals could hear direct challenges only to EPA actions listed in Section 1369(b)(1) or actions that had the "precise effect" of listed actions. Neither case supports the conclusion that this Court should read Section 1369(b)(1) to include EPA actions that Congress clearly excluded from the scope of the provision. [20]

C. The Courts that Have Broadly Applied Section 1369(b)(1)(F) to General NPDES Regulations Have Improperly Departed from the Statute

Despite the unambiguous language of Section 1369(b)(1)(F), a handful of courts of appeals decisions have construed Section 1369(b)(1)(F) as providing them with direct review over not only EPA's issuance or denial of NPDES permits, but over broader categories of NPDES program regulations. See, *e.g.*, *Am. Mining Cong.* v. *EPA*,

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[20] Other opinions from this Court counsel against an expansive reading of similar judicial review provisions. See, *e.g.*, *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring) (expressing concern that a broad reading of the CAA's judicial review provision would raise "constitutional difficulties" because "a failure to seek immediate review will bar affected parties from challenging the [EPA] action in a subsequent criminal prosecution.").

965 F.2d 759, 763 (9th Cir. 1992) (court of appeals had original jurisdiction under Section 1369(b)(1)(F) to review "regulations governing the issuance of permits under [S]ection 402."); *Natural Res. Def. Council, Inc.* v. *EPA*, 966 F.2d 1292, 1296–97 (9th Cir. 1992) (court of appeals had original jurisdiction under Section 1369(b)(1)(F) to review "rules that regulate the underlying permit procedures."); *Natural Res. Def. Council, Inc.* v. *EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (court of appeals had original jurisdiction under Section 1369(b)(1)(F) to review EPA rule exempting certain discharges from the NPDES permit requirements.); *Nat'l Cotton Council*, 553 F.3d at 932–933 (court of appeals had original jurisdiction under 1369(b)(1)(F) to review EPA rule exempting certain pesticides from the NPDES permit requirements).

Not one of these decisions, however, includes more than a few sentences of analysis of the courts' original jurisdiction under Section 1369(b)(1). Moreover, these courts have stretched this Court's decision in *E.I. du Pont* well beyond the narrow issue before the Court in that case. For example, the court in *American Mining Congress* cited as its main authority an earlier D.C. Circuit opinion involving Section 1369(b)(1)(E), which in turn relied on this Court's admonition in *E.I. du Pont* against creating a "perverse situation" of bifurcated review. 965 F.2d at 763 (citing *Natural Res. Def. Council, Inc.* v. *EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981), in turn citing *E.I. du Pont*, 430 U.S. at 136). In so doing,

the Ninth Circuit took this admonition out of its original context of Section 1369(b)(1)(E), involving effluent limitations, instead applying it to a different statutory subsection—Section 1369(b)(1)(F)—and to regulations governing NPDES permitting decisions. 965 F.2d at 763.[21] As discussed above, this Court's reference to the "basic regulations" meant the national effluent limitations at issue in that case, not NPDES regulations generally. *E.I. du Pont*, 430 U.S. at 136. The *American Mining Congress* court's misapplication of *E.I. du Pont* forged the above-mentioned chain of case law that has become untethered to the statutory basis of this Court's ruling.[22] *American Mining Congress* and

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[21] The Ninth Circuit mistakenly read the D.C. Circuit's opinion as having made this same leap. 956 F.2d at 763. In fact, the court in *Natural Res. Def. Council, Inc.* v. *EPA* found that it had original jurisdiction under Section 1369(b)(1)(E), not Section 1369(b)(1)(F). 656 F.2d at 776.

[22] Other courts began suggesting a broader interpretation of Section 1369(b)(1) even before this line of cases, though the reach of their analyses was not always clear. For example, in *Natural Res. Def. Council, Inc.* v. *EPA*, the D.C. Circuit held that Section 1369(b)(1)(E) applied to NPDES regulations that included some provisions "guid[ing] the setting of numerical limitations in permits." 673 F.2d 400, 404-405 (D.C. Cir. 1982). To the extent the court believed it had jurisdiction over every regulation included in the 1980 Consolidated Permit Regulations ("CPRs"), it was mistaken. That the courts of appeals might have jurisdiction over challenges to "some of the CPRs", *id.* at 404, does not support the conclusion that the courts of appeals have jurisdiction over challenges to all of the CPRs. The D.C.

subsequent courts erred in assuming that *E.I. du Pont* provides them with original jurisdiction over regulations governing NPDES permitting procedures.

III. AN EXPANSIVE READING OF SECTION 1369(b)(1) DISRUPTS THE TRADITIONAL JURISIDCTION FEDERAL COURTS MAINTAIN TO REVIEW AGENCY ACTIONS

In cases like *Riverside Bayview*, *SWANCC*, and *Rapanos*, this Court long has assumed it has the authority to consider on an as-applied basis the legality of rules establishing the limits of statutory jurisdiction under the Clean Water Act.[23] Taken together, these decisions–and the readiness with which all concerned assumed that review was appropriate–highlight an important point: Requiring those who may be affected by specified EPA rules to seek immediate, facial review regarding the validity of those actions is an *exception* to the otherwise applicable assumption that agency rules may be evaluated on an as-applied basis.[24] The Administrative

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Circuit also offered no support for its distinction between policy-based rules and substantive rules. *Id.* at 405 & n.15.

[23] See also the discussion in fn. 15, *supra*, regarding *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261 (2009).

[24] As mentioned in fn. 13, *supra*, Section 1369(b)(1) requires that all challenges to qualifying actions be brought within 120 days, unless the relevant application "is based solely on

Procedure Act ("APA") acknowledges this broad scope of review in Section 701(a), where judicial review is granted "except to the extent that–(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

In evaluating statutory preclusion principles, this Court has routinely applied a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action[s]." *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (permitting review of an agency action under the Immigration and Nationality Act).[25] In order to rebut this presumption, there must be "clear and convincing evidence" to the contrary. *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (citing *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967)). A narrow interpretation of Section 1369(b)(1) is consonant with the general presumption of reviewability under the APA and this Court's

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grounds which arose after such 120th day." 33 U.S.C. 1369(b)(1)(F).

[25] See also *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 675–78 (1986) (interpreting the Medicare statute to allow an individual to challenge a regulation's validity despite a preclusion on review for individual claims under the statute); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 (1995) (explaining that when a statute is "reasonably susceptible to divergent interpretation," this Court adopts the reading "that executive determinations generally are subject to judicial review").

previous review of CWA regulations outside the context of Section 1369(b)(1).

The Government is likely to cite *Crown Simpson* in arguing that its expansive interpretation of Section 1369(b)(1)(F) would ensure prompt resolution of the relevant statutory issues. 445 U.S. at 197. As noted, however, this reading of Section 1369(b)(1)(F) stretches both the statute and *Crown Simpson* beyond their breaking points. Moreover, the very virtue that the Government sees in its countertextual reading of Section 1369(b)(1)(F)—as its limitation on challenges to those brought within 120 days—poses countervailing policy dynamics that pull at least as hard in the opposite direction.

If Section 1369(b)(1)(F) is extended beyond the realm of permit decisions to rules addressing statutory jurisdiction, the net result will be unnecessary and excessive litigation. This is because, like much of environmental law, jurisdictional issues under the CWA are inevitably laden with what this Court—in a slightly different context—has termed "everpresent ambiguities." *Interstate Commerce Comm'n* v. *Brotherhood of Local Eng'rs*, 482 U.S. 270, 286 (1987). In such situations, even those who track regulatory developments closely may face significant uncertainty about whether the regulations apply to specified scenarios: the regulations may mean what they believe they should mean, or they may not. See, *e.g.*, *Decker* v.

Northwest Env. Def. Ctr., 133 S.Ct. 1326, 1336-1338 (2013) (involving the issue whether runoff from timber roads constituted "storm water discharges from . . . immediate access roads . . . used or traveled by carriers of raw materials," within the meaning of 40 C.F.R. 122.26(b)(14)); *Recreational Vehicle Indus. Ass'n* v. *EPA*, 653 F.2d 562 (D.C. Cir. 1981) (involving the issue of whether motor homes qualified as "medium and heavy trucks" within the meaning of the relevant regulation); *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 220-223 (4th Cir. 1997) (addressing whether the term "use" in an exemption to EPA's fugitive emission regulations meant overall consumption or, alternatively, whether the relevant chemical was counted each time it cycled through the system); *United States* v. *Magnesium Corp. of America*, 616 F.3d 1129 (2010) (finding that EPA was not precluded from relying on a new interpretation of an ambiguous regulatory exemption merely because it previously had announced a different, tentative, interpretation).

In the Clean Water Act context, this uncertainty can plague both potential environmental petitioners and both regulated and potentially regulated entities. For would-be environmental challengers, the regulations may not clearly indicate whether they address scenarios the environmental challengers believe must be regulated under the statute. In other contexts, regulated entities may be unsure about whether or how the new regulations apply to

them.

In all of these situations, the relevant entities may face what would traditionally appear to be unripe claims. See *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 728 (1998) (deeming a speculative application of a general forestry plan not to be ripe for review). But at the same time, they may risk waiving valid statutory arguments if they do not bring their challenges within 120 days, the prescribed period under Section 1369(b)(1). *See Brotherhood of Local Eng'rs*, 482 U.S. at 286 ("[w]e are not prepared to acknowledge an exception . . . where an order is ambiguous, so that a party *might* think that its interests are not infringed") (emphasis in original). Instead, their ability to challenge any later applications of those regulations may be limited to arguments about whether the agency's resolutions of any ambiguities are clearly erroneous, see *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), rather than whether the regulations—as so interpreted—are consistent with the CWA.

The courts have suggested two potential solutions to this problem, neither of which is entirely satisfying. In *Brotherhood of Local Eng'rs*, this Court suggested that such entities should file petitions with the agencies to resolve any ambiguities within the relevant statutory time periods, which would "enable[e] judicial review" if the agency's "resolution of the ambiguity is adverse." 482 U.S. at 286. This, of course, presumes that the agency would respond

within the relevant statutory period—120 days under Section 1369(b)(1)—which may be an uncertain prospect.

Second, despite *Brotherhood of Local Eng'rs*, the D.C. Circuit has continued to apply an implied ripeness exception to these strict statutory time limits in situations in which the ambiguity is such that a later petitioner "could reasonably have understood [the regulation] to mean *only* what [it] thought it meant." *ANR Pipeline Co.* v. *FERC*, 988 F.2d 1229, 1233-1234 (D.C. Cir. 1993) (emphasis in original). This exception is narrow, and the D.C. Circuit has long admonished would-be petitioners that "if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred." *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985) (emphasis in original).

Requiring parties to file petitions and/or seek immediate judicial review in the face of any and all regulatory ambiguities would, to say the least, be highly inefficient. But given the "speak now or forever hold your peace" dynamics embodied in these judicial review provisions, interpreting them broadly poses this very risk. As Judge Easterbrook noted:

> [T]he more we pull within [Section 1369(b)(1)], the more arguments will be knocked out by inadvertence later on—and the more reason firms will have to petition for review of everything in sight.

Am. Paper Inst. v. *EPA*, 882 F.2d 287, 289 (7th Cir. 1989).

Additionally, as Justice Powell observed more than 35 years ago, there are potential due process issues–and at the very least serious fairness concerns–inherent in the preclusion dynamics posed under provisions like Section 1369(b)(1). In his concurring opinions in both *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 289-291 (1978), and *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 594-595 (1980), Justice Powell stressed these concerns in cases involving 42 U.S.C. 7607(b)(1), the Clean Air Act's structurally-similar judicial review provision.

In *Adamo*, Justice Powell expressed doubt about the constitutionality of Section 7607(b)(1), which at the time required that challenges be brought within 30 days after EPA promulgated the relevant regulations. 434 U.S. at 289. In so doing, he noted his view that:

> It . . . is totally unrealistic to assume that more than a fraction of the persons and entities affected by the regulation–especially small contractors scattered across the county–would have knowledge of its promulgation or familiarity with or access to the Federal Register.

Id. at 290. Noting that this Court previously had upheld a similar scheme against a due process challenge in *Yakus* v. *United States*, 321 U.S. 414 (1944), Justice Powell opined that this earlier

opinion was "at least arguably distinguishable" because it involved the Emergency Price Control Act, which this Court had noted was an emergency, war-time measure. 434 U.S. at 290.

By the time *Harrison* came before the Court two years later, Congress had amended Section 7607(b)(1) to extend the period within which regulations could be challenged to 60 days. 446 U.S. at 594. While concurring with the majority's view that Section 7607(b)(1) applied to EPA's action in that case, Justice Powell reiterated his concern that publication of a rule in the Federal Register "is unlikely to provide constitutionally adequate notice that a failure to seek immediate review immediate will bar affected parties from challenging the noticed action in a subsequent criminal prosecution." *Id.* He further indicated his agreement with the D.C. Circuit that, at the very least, "these constitutional dynamics may counsel a narrow construction of [42 U.S.C. 7607(b)(1)]." *Id.* (citing *Chrysler Corp.* v. *EPA*, 600 F.2d 904, 912-914 (D.C. Cir. 1979)).[26]

At a minimum, an expansive interpretation of Section 1319(b)(1) would pose a host of ripeness, judicial inefficiency, and fairness concerns. Additionally, the due process concerns Justice

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[26] While would-be environmental petitioners may not have a due process right to challenge suspect regulations, the concerns that Justice Powell has identified are still salient from notice and fairness perspectives.

Powell identified in *Adamo* and *Harrison* are elevated where the rules sweep as broadly as do the jurisdiction-defining rules here. In sum, these policy concerns far outweigh the Government's interest in expedition and clarity. The Court should avoid these negative policy implications by interpreting Section 1369(b)(1)(F) as written.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss these consolidated petitions for lack of jurisdiction.

Dated: April, 2017.

Respectfully submitted,

Allison M. LaPlante
Counsel of Record
James N. Saul
EARTHRISE LAW CENTER
LEWIS & CLARK LAW SCHOOL
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 768–6894 (LaPlante)
(503) 768-6929 (Saul)
laplante@lclark.edu
saul@lclark.edu

Counsel for Respondents Waterkeeper Alliance, et al.

Jennifer C. Chavez
EARTHJUSTICE
1625 Massachusetts Av. NW,
Suite 702
Washington, DC 20036
(202) 667-4500
jchavez@earthjustice.org

Counsel for Respondents Sierra Club and Puget Soundkeeper Alliance

RECORD AND BRIEFS

No. 16-299

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF OF RESPONDENTS WATERKEEPER ALLIANCE, INC., CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR FOOD SAFETY, HUMBOLDT BAYKEEPER, RUSSIAN RIVERKEEPER, MONTEREY COASTKEEPER, SNAKE RIVER WATERKEEPER, INC., UPPER MISSOURI WATERKEEPER, INC., TURTLE ISLAND RESTORATION NETWORK, INC., SIERRA CLUB, AND PUGET SOUNDKEEPER ALLIANCE IN SUPPORT OF PETITIONER

JENNIFER C. CHAVEZ
EARTHJUSTICE
1625 Massachusetts Av. NW
Suite 702
Washington, DC 20036
(202) 667-4500
jchavez@earthjustice.org

ALLISON M. LAPLANTE
Counsel of Record
JAMES N. SAUL
EARTHRISE LAW CENTER
LEWIS & CLARK LAW SCHOOL
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 768–6894 (LaPlante)
(503) 768-6929 (Saul)
laplante@lclark.edu
saul@lclark.edu

Counsel for Respondents

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Law Library

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ARGUMENT

Section 1369(b)(1)(E) of the Clean Water Act ("CWA" or the "Act") applies to actions taken by the Administrator of the U.S. Environmental Protection Agency ("EPA") in "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title." 33 U.S.C. § 1369(b)(1)(E). In this case, EPA and the U.S. Army Corps of Engineers (collectively, the "Agencies") argue that the Clean Water Rule qualifies as an "other limitation" under Section 1311 of the Clean Water Act. This argument fails for two reasons. First, the Clean Water Rule does not properly qualify as an "other limitation" within the meaning of Section 1369(b)(1)(E) because it merely interprets the Congressional definition of those waters to which existing limits apply; it does not create a new one. And second, the Agencies did not promulgate the Clean Water Rule pursuant to Section 1311 or any of the other sections listed in Section 1369(b)(1)(E).

A. The Clean Water Rule Is Not An "Other Limitation" Within The Meaning Of Section 1369(b)(1)(E)

On its face, Section 1369(b)(1)(E) applies only to "effluent limitation[s]" and "other limitation[s]" approved or promulgated pursuant to the four specified statutory sections, 33 U.S.C. §§ 1311, 1312, 1316, and 1345. The Agencies urge this Court to deem the Clean Water Rule an "other limitation"

promulgated pursuant to Section 1311. The Court should reject this invitation.

While Congress did not define the term "other limitation" as used in Section 1369(b)(1)(E), it is best understood by virtue of its relationship to both the immediately preceding phrase, "effluent limitation," and the four specified statutory sections listed in Section 1369(b)(1)(E).

Section 1369(b)(1)(E) clearly juxtaposes the terms "effluent limitation[s]" and "other limitation[s]" approved or promulgated under the relevant provisions. As Justice Ginsburg recently noted in *Yates v. United States*, "we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." ___ U.S. ___, 135 S.Ct. 1074, 1085 (2015) (plurality opinion) (internal quote and citation omitted). In the present context, this Court should look to the characteristics of "effluent limitation[s]" under the Statute, and how they are implemented, to understand what Congress must have meant by the counterpart phrase, "other limitation."

Congress defined the phrase "effluent limitation" in the following terms:

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities,

> rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11). In practice, EPA typically sets these limitations, often pursuant to an express grant of statutory power. Indeed, the statutory sections referenced in Section 1369(b)(1)(E)—Sections 1311, 1312, 1316 and 1345—speak frequently and explicitly about the approval or promulgation of standards meeting the above definition.[1]

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[1] *See, e.g.*, 33 U.S.C. §§ 1311(c), (d), (g), (h), (i), (k), (m), (n), and (p) (allowing EPA, with the concurrence of the states in some instances, to update or approve modifications—in specified contexts—to either the substance or the timing of the relevant requirements), 1312(a) (authorizing EPA to establish water-quality-related permit conditions), 1316(b)(1)(B) (authorizing EPA to promulgate new source performance standards), and 1345(b) (authorizing EPA to promulgate sewage sludge regulations where the handling of such sludge by a treatment plant may impact the navigable waters). The sole exception to this dynamic is in Section 1311(b), which, as this Court noted in *E.I. du Pont de Nemours & Co. v. Train*, is oddly silent about "who sets the § [1311] effluent limitations." 430 U.S. 112, 121 (1977) ("*E.I. du*

More significantly, and as the Agencies acknowledge, effluent limitations generally take effect for individual dischargers only when they are incorporated into permits issued under the national pollutant discharge elimination system ("NPDES"); in this context, the permit issuer—which may be either EPA or a state, *see* 33 U.S.C. § 1342(a)(1) and (b)(1)—in effect "translates" the national standards into facility-specific requirements. Federal Respondents' Brief at 23 (citing *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928 (5th Cir. 1998) and *Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 344 (5th Cir. 1981)). Once the effluent limitations are incorporated into the relevant permits, the resulting permit conditions become enforceable under the Act. *See, e.g.*, 33 U.S.C. §§ 1319(a), (b), and (d) (EPA enforcement) and 1365(a)(1) and (f) (citizen suits).[2]

Turning to the realm of "other limitation[s]," three of the statutory sections referenced in Section 1369(b)(1)(E)—Sections 1311, 1316, and 1345—authorize EPA to establish substantive

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Pont"). Nonetheless, the *E.I. du Pont* Court found that EPA had correctly interpreted Section 1311(b) as giving it the power to set those standards through rulemaking. *Id.* at 135–136.

[2] Although these provisions also reference other statutory sections, including Sections 1311, 1312, 1316, and 1345, for permitted entities in most cases it is the permit condition that must be enforced, not

requirements, some of which cannot constitute "effluent limitation[s]" because they do not address "discharge[s] from point sources into navigable waters," as required under Section 1362(11). In the first two of these contexts, this power emerges from the interplay between these sections and Section 1326 of the Act. In that section—dealing with thermal discharges—Congress gave EPA the power to establish what are colloquially referred to as "intake structure" regulations, governing water withdrawals by power plants. 33 U.S.C. § 1326(b). As the Fourth Circuit recognized in *Virginia Elec. & Power Co. v. Costle*, 556 F.2d 446 (4th Cir. 1977), however, Section 1326(b) itself makes clear that the regulations were to be promulgated under Sections 1311 or Section 1316 (for existing or new sources, respectively). *Id.* at 450, citing 33 U.S.C. § 1326(b) ("any standard established pursuant to section [1311] or [1316] ... shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact"). Thus, the court correctly determined that the standards constituted "other limitation[s]" within the meaning of Section 1369(b)(1)(E). *Id.*

In similar fashion, Section 1345(d) of the Act charged EPA with establishing standards for the disposal of sewage sludge generated by sewage treatment plants. 33 U.S.C. § 1345(d). These regulations cover, *inter alia*, the land application of such sludge (e.g., as fertilizer), the disposal of sludge at surface sites, and the incineration of sludge in sewage sludge incinerators. 40 C.F.R.

Part 503 (subparts B, C, and E, respectively). Here also, at least some of the regulations cannot constitute "effluent limitation[s]," because they address threats to soils and air, not the navigable waters.[3] Thus, these regulations are best viewed as "other limitation[s]" within the meaning of Section 1369(b)(1)(E).

In both of the above contexts—dealing with intake structures and sewage sludge—the requirements are implemented through permit conditions. *See* 40 C.F.R. § 125.90(a) (intake structures) and 33 U.S.C. § 1345(f) (sewage sludge).[4]

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[3] *See, e.g.*, 40 C.F.R. § 503.43 (imposing limitations and other requirements under authority of Section 1345 for the incineration of sewage sludge intended to control air pollutant emissions); *see also* 58 Fed. Reg. 9248, 9249 (Feb. 19, 1993) (Preamble to EPA's initial Part 503 regulations, promulgated under authority of Section 1345, noting that "[c]oncern for air quality necessitates proper controls over sludge incineration").

[4] In the sewage sludge context, the permit does not necessarily need to be an NPDES permit. *See* 33 U.S.C. § 1345(f). As EPA has noted, however, it usually is. EPA, A Plain English Guide to the EPA Part 503 Biosolids Rule (September 1994) at 11 ("In most cases, Part 503 requirements will be incorporated over time into [NPDES] permits issued to [the relevant entities]."), *available at* https://www.epa.gov/sites/production/ files/2015-05/documents/a_plain_english_guide_to_the_epa_p

In line with the above, the phrase "other limitation," as used in Section 1369(b)(1)(E), is best understood in context. In the four statutory provisions referenced in that Section, Congress charged EPA with establishing various requirements, which were then to be made applicable to individual dischargers through permit conditions. As befits the NPDES program's primary focus on discharges of pollutants, *see* 33 U.S.C. §1342(a), most of these requirements qualify as "effluent limitation[s]" within the meaning of Section 1362(11). The others—those not governing discharges—constitute the relevant "other limitation[s]."

The Agencies, by contrast, urge a practically unlimited interpretation of the "other limitation" phrase, at least insofar as it deals with a subject relating to Section 1311 in any way. Federal Respondents' Brief, pp. 17–18. In particular, they argue that "[a] rule that specifies which sites are 'waters of the United States' imposes on persons who discharge pollutants to those waters the full panoply of effluent and other limitations under Section 1311." *Id.* This position is untenable. As Judge Griffin noted below, it is the Act itself—not the Clean Water Rule—that "restricts the industry's untrammeled discretion." *In re United States Dept. of Defense and United States Environmental Protection Agency Final Rule: Clean*

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art_503_biosolids_rule.pdf (last checked September 8, 2017).

Water Rule: Definition of "Waters of the United States", 817 F.3d 261, 279-280 (6th Cir. 2016) (*In re Dept. of Defense*") (Griffin, J., concurring in judgment). Specifically, Section 1311(a), when taken together with the definitions in Section 1362, prohibits persons from discharging pollutants into the "waters of the United States," except to the extent that they comply with specified requirements, including—in appropriate cases—the requirements of the NPDES permit program. 33 U.S.C. 1311(a) (referencing 33 U.S.C. §1342). This prohibition is in no way dependent upon the Clean Water Rule, which does not "limit" anything. The Agencies conceded as much in the preamble to the Rule:

> The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,102 (June 29, 2015).

Instead of establishing limitations, the Clean Water Rule merely clarifies the waters to which the statutory prohibition in Section 1311(a) applies. The Agencies' comments in the preamble also confirm this point:

> This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States ..." consistent with Supreme Court precedent.

Id. (citation omitted).

The conclusion that the Clean Water Rule does not constitute an "other limitation" is further underscored by the fact that nothing in the statute even contemplates that the Agencies would write rules further elaborating on the scope of the statutory waters, or on any of the other jurisdictional elements of Section 1311(a), let alone requires them to do so. Nothing would have constrained the Agencies from proceeding from the outset without regulations defining the "waters of the United States." In following such a course, the Agencies could have gradually established at least some clarification through litigation. While attempting to write clarifying regulations on an up-front basis may be a salutary undertaking, clarifying the scope of a limitation simply is not the same thing as establishing a limitation. Congress, not the Agencies, created the limitation in Section 1311(a)(1).

B. The Agencies Did Not Promulgate The Clean Water Rule Pursuant To Section 1311 Or Any Of The Other Relevant Sections Listed In Section 1369(b)(1)(E)

Even if the Court determines that the Clean Water Rule establishes limitations capable of qualifying as "other limitation[s]" under Section 1369(b)(1)(E), it still would not trigger the applicability of that Section. This is so because Section 1369(b)(1)(E) also requires—as a precondition to its applicability—that EPA approve or promulgate the rule pursuant to one of four statutory sections, 33 U.S.C. §§ 1311, 1312, 1316, or 1345. In the preamble to the Clean Water Rule, the Agencies cited five separate sections as providing the legal basis for their authority, including, most notably, Sections 1311 and 1361. Of the five, Section 1311 is the only one that appears on the list of qualifying authorities in Section 1369(b)(1)(E). 80 Fed. Reg. at 37,055.[5] Perhaps for this reason, the Agencies rely entirely on Section 1311 in their brief. Federal Respondents' Brief, pp. 17–30.[6] Section 1311 does not provide an adequate statutory basis for the Clean Water Rule. EPA's

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[5] The others were Sections 1341, 1342, and 1344. 80 Fed. Reg. at 37,055.

[6] The Agencies reference Section 1361 once as support for the Rule, in a footnote in the introduction to their argument. Federal Respondents' Brief at 17, n.3. It never comes up again.

proper basis for promulgating a rule further defining the Act's jurisdictional terms resides in Section 1361(a), which is not within the scope of Section 1369(b)(1)(E).

Section 1361(a) provides EPA with the general authority to "prescribe such regulations as are necessary to carry out [its] functions under [the Act]." 33 U.S.C. § 1361(a). As alluded to above, *see* footnote 1 and accompanying text, several sections of the Clean Water Act provide EPA with the authority to promulgate regulations that are geared to specific programs. *See also, e.g.*, 33 U.S.C. §§ 1317(b) (requiring EPA to promulgate "pretreatment standards" for those who discharge effluent into publicly owned treatment works) and 1322(b) (requiring EPA to "promulgate Federal standards of performance for marine sanitation devices").

Putting aside any issues regarding the merits of the Rule, the proper legal authority for the Clean Water Rule is found only in Section 1361(a). This is so for at least two compelling reasons. First, no other provision of the Act provides any explicit basis for the promulgation of regulations interpreting the definitional components of Section 1362 (including the definition of "navigable waters" in Section 1362(7), which is where the "waters of he United States" language appears). In other situations, of course, a court might infer that an agency has the implied authority to resolve any definitional ambiguities. But here there is no need.

Section 1361(a) explicitly provides a breadth of authority that readily encompasses such a rule.

Second, the terms that are being defined here—"waters of the United States" and thus, in turn, "navigable waters"—apply across the entire statute. The Agencies themselves recognized this in the preamble to the Clean Water Rule:

> The jurisdictional scope of the [CWA] is "navigable waters," defined in section [1362(7)] of the statute as "waters of the United States, including the territorial seas." The term "navigable waters" is used in a number of provisions of the [CWA], including the section [1342] National Pollutant Discharge Elimination System (NPDES) permit program, the section [1344] permit program, the section [1321] oil spill prevention and response program, the water quality standards and total maximum daily load programs (TMDL) under section [1313], and the section [1341] state water quality certification process.

80 Fed. Reg. at 37,055 (footnote omitted). It is self-evident that a provision giving EPA statute-wide rulemaking authority is the proper place to ground the authority for the most over-arching regulation promulgated under the statute.

Section 1311 simply will not bear the weight the Agencies place upon it. While it contains several provisions authorizing EPA to create, update, or modify effluent limitations, *see, e.g.*, Section 1311(c), (d), and (g), that section simply contains no indication that it provides EPA with any authority to interpret the Act's jurisdictional definitions. The Agencies point to the basic prohibition in Section 1311(a), but nothing in that provision is even suggestive regarding the creation of any general rulemaking authority. Moreover, as Judge Griffin noted below, "the definitional section the Clean Water Rule modifies—'the term 'navigable waters' means the waters of the United States'"—does not emanate from Section 1311(a). *In re Dept. of Defense*, 817 F.3d at 277 (Griffin, J., concurring). Instead, as Judge Griffin further noted, it finds its origin in Section 1362, which is not mentioned in Section 1369(b)(1)(E).

This Court should deem the Clean Water Rule to have been promulgated under Section 1361(a) of the Clean Water Act, thus making it ineligible for expedited review under Section 1369(b)(1)(E).

CONCLUSION

For the foregoing reasons and for the reasons stated in Respondents' opening brief, the judgment of the court of appeals should be reversed.

Dated: September, 2017.

Respectfully submitted,

Allison M. LaPlante
Counsel of Record
James N. Saul
EARTHRISE LAW CENTER
Lewis & Clark Law School
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 768–6894 (LaPlante)
(503) 768-6929 (Saul)
laplante@lclark.edu
saul@lclark.edu

Counsel for Respondents
Waterkeeper Alliance, et al.

Jennifer C. Chavez
EARTHJUSTICE
1625 Massachusetts Av. NW
Suite 702
Washington, DC 20036
(202) 667-4500
jchavez@earthjustice.org

Counsel for Respondents
Sierra Club and Puget
Soundkeeper Alliance

ECORD
AND
RIEFS

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NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF RESPONDENT UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER

Kristy A. N. Bulleit
Counsel of Record
ANDREW J. TURNER
KARMA B. BROWN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20037
kbulleit@hunton.com
(202) 955-1500
Counsel for Respondent Utility Water Act Group

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INTRODUCTION

The government argues that a rule establishing the outer geographic reaches of "the waters of the United States" Congress protected under the Clean Water Act ("CWA" or the "Act") falls within a specific list of Environmental Protection Agency ("EPA") actions subject to expedited review in a single court of appeals. EPA actions named in Section 1369(b)(1) may be judicially reviewed *only* if challenged within 120 days and *only* where all challenges are consolidated before a single court of appeals. These constraints limit judicial review, and, as a result, courts have cautioned against expansive interpretation of Section 1369. One would expect the government to point to a plain statement from Congress that it intended so narrow an opportunity for review for a rule as vast as "the waters of the United States" rule ("WOTUS Rule" or the "Rule"). But the government can point to no such statement in Section 1369 and instead argues that the Rule is something it plainly is not.

The WOTUS Rule was jointly issued by EPA and the U.S. Army Corps of Engineers ("Corps") (together, "Agencies"). It sets forth the Agencies' interpretation of a key statutory term – "the waters of the United States" ("WOTUS") – that establishes the geographic scope of the Agencies' jurisdiction for all CWA regulatory programs. By defining the geographic reach of the Act through the WOTUS Rule, the Agencies have purported to interpret the will of Congress regarding which lands and waters come

under the protections of the Act. Whether a feature is a WOTUS is an overarching determination that addresses whether the CWA applies to a specific land or water feature at all. The determination whether and to what features the WOTUS Rule applies does not dictate whether an activity qualifies for a CWA permit or not, nor does it establish any limits, effluent or otherwise, which would apply through, or in lieu of, a permit, as the government contends.

The government argues that the WOTUS Rule is subject to direct appellate review under Section 1369(b)(1) because this joint rule defining WOTUS is a "limitation" or a "permit." See Fed. Resp'ts' Br. at 10-11. But the government's arguments blur the specific provisions of Section 1369(b)(1) to the point that the terms Congress selected are rendered essentially meaningless.

Straying well outside the lines of Section 1369, the government argues that a rule that establishes geographic jurisdiction for a wide range of CWA regulatory programs fits into two of the seven discrete categories of EPA action subject to Section 1369(b)(1) – those for limitations and for permits. According to the government, a rule establishing the outer boundaries of the Act limits activities within and permits activities beyond those boundaries. But even a brief review of the Act shows these are not the types of limitations and permits Congress had in mind. Indeed, a CWA permit authorizes discharges into WOTUS; it does not authorize activities beyond the reach of the Act (nor could it). Similarly, the WOTUS Rule is not a "limitation" because it is not

the type of limit Congress called on EPA to set for discharges into WOTUS; it is a threshold determination of those waters that are WOTUS.

The WOTUS Rule is a broad ranging definitional rule that is distinct from the enumerated EPA actions that are subject to circuit review under Section 1369(b)(1). Accordingly, this Court should reverse the judgment of the Court of Appeals.[1]

ARGUMENT

I. The Government Has Narrowly Framed the WOTUS Rule in a Manner that Fundamentally Mischaracterizes the Rule

Congress instructed EPA to develop and implement CWA programs for those waters or activities that the statute makes jurisdictional. The WOTUS Rule, however, is not one of those programs. Rather, the Rule is the Agencies' latest attempt to interpret the scope of the CWA's geographic jurisdiction, consistent with Congressional intent. The government conflates geographic CWA jurisdiction, which determines where activities are regulated, with EPA-promulgated restrictions, which determine whether and how an activity is regulated.

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[1] The Utility Water Act Group ("UWAG") adopts in full the arguments presented by Petitioner National Association of Manufacturers ("NAM") and the Respondent States filing in support of NAM.

A. In Promulgating the WOTUS Rule, the Agencies' Task Was to Interpret Congress' Intent in the CWA

When Congress enacted the CWA, it determined the reach of the statute and set the prohibitions and conditions that must be met. The challenged Rule interprets a crucial statutory term – WOTUS – which triggers myriad CWA requirements and restrictions. Of these, the Act's key restriction is the prohibition against discharges of pollutants into "navigable waters," 33 U.S.C. § 1311, defined as "the waters of the United States." *Id.* § 1362(7). The Act's prohibition against discharges applies without any need for action by EPA or the Corps.

As an exception to the ban on discharges, the CWA establishes *two* separate permitting programs administered by separate agencies, EPA *and* the Corps, depending on the type of pollutant being discharged (*e.g.*, industrial waste, Section 1342, or dredged or fill material, Section 1344). Congress empowered the Agencies to administer these permitting programs for those lands and waters that are subject to federal CWA jurisdiction. Permit holders seeking to discharge pollutants must abide by any applicable limitations established under other statutory sections, such as "effluent limitations" for existing point sources and water quality limits. See, *e.g.*, 33 U.S.C. §§ 1311 (effluent limitations guidelines), 1312 (water quality limitations), 1316 (new source performance standards), 1317 (toxic standards), and 1345 (limitations for disposal or use of sewage sludge).

The WOTUS Rule is the Agencies' most recent attempt to interpret the statutory phrase WOTUS, which applies broadly to all CWA regulatory programs. Nothing in the Act requires the Agencies to define the term WOTUS. As such, in issuing the WOTUS Rule, the Agencies were not acting pursuant to instructions from Congress, as they are when administering the specific permitting programs for those features that are deemed to be subject to CWA jurisdiction. Instead, in attempting to define the geographic reach of WOTUS, the Agencies' task was to interpret what Congress meant in the CWA, as discernable from the text, framework, and history of the statute.[2]

Contrary to the government's framing of the Rule, it neither restricts discharges or other activities, nor determines whether or on what terms EPA may issue a permit. Rather, the WOTUS Rule broadly determines where the Act applies, which is a statutory predicate to the requirement to obtain a permit. And that predicate is determined by Congress, not EPA.

B. A Wide Range of CWA Programs Rely on the Definition of WOTUS

In order to fit the Rule within two of the discrete categories of EPA action reviewable under Section 1369(b)(1), the government frames the WOTUS Rule

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[2] Indeed, during promulgation of the WOTUS Rule, the Agencies explained that the Rule does not impose new restrictions or create new requirements because the Rule simply interprets and clarifies an existing statutory term. 80 Fed. Reg. 37,054, 37,101 (June 29, 2015).

narrowly, ignoring the full panoply of CWA programs that rely on the WOTUS definition. See, *e.g.*, Fed. Resp'ts' Br. at 16. The government portrays the Rule as primarily governing "the geographic scope of effluent limitations under Section 1311," *id.* at 5, 19, 27, and downplays the myriad other CWA programs that apply the WOTUS definition.[3]

UWAG members' activities and projects, for example, are often subject to multiple CWA programs that apply the WOTUS definition, which the government ignores, including: the program implementing the Section 1321 oil spill provisions, requiring a Spill Prevention, Control, and Countermeasure plan for facilities that have the potential to discharge into WOTUS; the water quality standards provisions, which apply to all WOTUS; and EPA's Section 1326(b) rules for new and existing facilities, which apply to facilities that withdraw "cooling water" from WOTUS and have any sort of National Pollutant Discharge Elimination System ("NPDES") permit. It is precisely because of the broad spectrum of CWA

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[3] The government selectively references just two provisions of the Act upon which the Agencies purport to rely in promulgating the Rule, ignoring the fuller list of CWA programs cited in the Preamble. *Compare* Fed. Resp'ts' Br. at 6 (stating that the Rule was issued under 33 U.S.C. Sections 1311 and 1342) *with* 80 Fed. Reg. at 37,055 (stating that the Rule is issued under the authority of the CWA, 33 U.S.C. §§ 1251, *et seq.*, "including sections 301, 304, 311, 401, 402, 404 and 501"). The Agencies' broad statement in the WOTUS Rule Preamble regarding the authority for the Rule contradicts the government's current assertion that the Rule is a specific EPA action subject to Section 1369(b)(1).

programs to which the Rule applies that the Rule has such critical implications for regulated parties, including UWAG members and the electric utility industry, the States, and the public.

Further demonstrating its mischaracterization of the WOTUS Rule, the government minimizes the Rule's application to the Corps' Section 1344 program and the Corps' critical role as a co-signatory in the rulemaking. The Agencies' Economic Analysis for the WOTUS Rule, however, underscores the Corps' prominent and lead role. The Economic Analysis attributes most of the economic impacts of the WOTUS Rule to the Corps and recognizes that the Corps took over 63,000 permit actions in Fiscal Year 2014 alone.[4] Economic Analysis at x-xi, 35, 56. The Economic Analysis does not even purport to identify the impacts of other regulatory programs. *Id.* at 21. For example, the Agencies made no attempt to estimate significant impacts for the Section 1342 program, yet they now claim that the Rule "controls whether permits may or may not be issued" under the Section 1342 NPDES program and is therefore reviewable by the circuit courts under Section 1369(b)(1)(F). See, *e.g.*, Fed. Resp'ts' Br. at 12.

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[4] Although the Economic Analysis dramatically underestimates the impacts of the Rule, it illustrates the prominence of the Corps' role. U.S. EPA and U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 20, 2015), http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-20866 ("Economic Analysis").

The Agencies can't have it both ways. The Agencies' interpretation of the geographic reach of the term WOTUS carries considerable regulatory consequences for a wide range of CWA programs implemented and enforced by not only EPA, but also the States, the Corps, and the U.S. Coast Guard. Thus, the Rule simply does not fit within the specified categories of EPA action subject to circuit court review.

II. The WOTUS Rule Is Neither the Issuance or Denial of an NPDES Permit Nor the Functional Equivalent of an NPDES Permit

The government argues that the WOTUS Rule is reviewable under Section 1369(b)(1)(F) because it "controls whether permits may or may not be issued for the bodies of water that it describes," and thus is "functionally similar" to the issuance or denial of a permit under Section 1342. *Id.* These arguments again rest on a fundamental misrepresentation of the Rule and the NPDES permit scheme.

A. The Definition of WOTUS Is a Predicate to the Issuance or Denial of an NPDES Permit

By claiming that the Rule is reviewable under Section 1369(b)(1)(F), the government stretches Section 1369 beyond the statutory text. An agency cannot issue or deny a permit for activities over which it has no jurisdiction.

The WOTUS Rule is the Agencies' interpretation of an overarching statutory term on which the CWA's discharge prohibition rests. 80 Fed. Reg. at 37,054,

37,102. The definition of WOTUS is essential to determining whether the prohibition against discharges applies, but the Rule does not restrict discharges or other activities, or determine whether a permit is required and, if so, with what conditions.

Even if a feature is determined to be a WOTUS, that is distinct from the determination whether an NPDES permit is required and should be issued. The obligation to apply for an NPDES permit, and thus the opportunity for EPA (or the States) to issue or deny a permit, arises only where there is a "discharge of pollutants," defined as an "addition," from a point source to a WOTUS. See *Nat'l Pork Producers Council* v. *EPA*, 635 F.3d 738, 749 (5th Cir. 2011); *Nat. Res. Def. Council* v. *EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987); 33 U.S.C. § 1362(7), (12).

B. The Functional Similarity Test Is Applied Narrowly

The government asserts that the WOTUS Rule is reviewable under the functional approach of *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (*per curiam*). Fed. Resp'ts' Br. at 12. This is incorrect and would result in a far broader "functional approach" than this Court applied in *Crown Simpson* and *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977).[5]

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[5] The *Crown Simpson* Court held that an EPA action disapproving effluent limits in a state-issued NPDES permit was "functionally similar" to a permit denial and, therefore, reviewable under Section 1369(b)(1)(F). 445 U.S. at 196. Otherwise, the Court explained, jurisdiction over "denials" of NPDES permits

In both cases, only EPA action was at issue, and only with respect to specific NPDES program requirements that applied once an applicant applied for an NPDES permit. Courts have held that reading Section 1369(b)(1)(F) to apply to any "'regulations relating to permitting itself" would be "contrary to the statutory text." *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012); *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008). The WOTUS Rule applies to all CWA programs, including Corps-administered programs not listed in Section 1369, and provisions that do not involve the issuance of permits (*e.g.*, water quality standards).

This Court should apply a functional approach to find that the WOTUS Rule does not have the "precise effect" of an action to issue or deny a permit. Even under a broader reading, however, the WOTUS Rule is not subject to judicial review under Section 1369(b)(1)(F) because it does not regulate permit procedures.

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would illogically depend on whether the State was authorized to issue permits. *Id.* at 196-97. *E.I. du Pont* involved industry-specific technology-based "effluent limitations" that EPA argued it was authorized to apply under Section 1311, and that, once adopted, would be applied in NPDES permits for members of the relevant industry category. 430 U.S. at 124.

C. Review of the WOTUS Rule in District Courts Will Not Result in a Bifurcated System of Judicial Review

Review of certain discrete, site-specific actions (like EPA's issuance of an NPDES permit) in the courts of appeals, as Congress dictated, and review of the WOTUS Rule (a joint rule of broad applicability interpreting those areas that are subject to the CWA) in the district courts would *not* lead to a "bifurcated system," as the government contends. Fed. Resp'ts' Br. at 31. Again, the government's fixation on NPDES permits glosses over the full spectrum of CWA programs that apply the WOTUS definition and portends the wrong result.

The Supreme Court applied a functional approach in *E.I. du Pont* and *Crown Simpson* to avoid "a seemingly irrational bifurcated system," *Crown Simpson*, 445 U.S. at 197, in which direct circuit court review is available for individual EPA permit actions, but not for "the basic regulations governing those individual actions" (*i.e.*, regulations that govern issuance or denial of a permit), *E.I. du Pont*, 430 U.S. at 136, or where the State has authority to issue a permit that EPA later vetoes, *Crown Simpson*, 445 U.S. at 196-97.

The Rule, however, is easily distinguished from the EPA actions at issue in those cases. The WOTUS Rule does not set any standards or limitations, or issue or deny any permits. The government's position relies on its false construct of the WOTUS Rule as a regulation setting the geographic limitations for

numeral or qualitative effluent limitations, see Fed. Resp'ts' Br. at 14. The government, however, ignores what the WOTUS Rule does and does not do.

The Rule defines the geographic scope of features to which various CWA requirements and restrictions may apply. Whether the Rule's definition of WOTUS applies to a specific water feature depends on a site-specific evaluation of the facts and characteristics of that feature. The Rule employs a wide range of vague, open-ended, and ambiguous terminology to define each of the categories of jurisdictional waters such that there are likely to be varying interpretations regarding whether any particular feature is a WOTUS.[6]

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[6] For example, the Rule defines "tributary" to mean "a water that contributes flow" and has the physical indicators of bed, banks, and ordinary high water mark ("OHWM"). 80 Fed. Reg. at 37,105, 37,107, 37,109, 37,111, 37,113, 37,115, 37,117, 37,119, 37,120-21, 37,122, 37,124, 37,126. But there is no consistent method for recognizing the OHWM. One Corps official told the U.S. General Accounting Office "that if he asked three different district staff to make a jurisdictional determination, he would probably get three different assessments of the ordinary high water mark." U.S. Gen. Accounting Office, GAO-04-297, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, 22 (Feb. 2004), www.gao.gov/new.items/d04297.pdf. See also Matthew K. Mersel, U.S. Army Corps of Eng'rs, Eng'r Research & Dev. Ctr., Development of National OHWM Delineation Technical Guidance, slide 3 (Mar. 4, 2014) ("vague definition" leads to "[i]nconsistent interpretations of OHWM concept," which leads to "[i]nconsistent field indicators and delineation practices").

Site-specific determinations of CWA jurisdiction are not reviewable until such time as the facts regarding the land or water feature at issue, and the Agencies' interpretation whether the Rule supports an assertion of CWA jurisdiction over that feature, are crystallized.[7] In that regard, the Court's decisions in the ripeness context are instructive. The ripeness doctrine serves to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-49 (1967). For example, in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), motor carriers sought judicial review of an Interstate Commerce Commission determination that certain commodities did not qualify for an agricultural exemption. *Id.* at 41. The order "would have effect only if and when a particular action was brought against a particular carrier."

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[7] The Agencies have acknowledged that "the rule does not project the miles or acres of waters that are or are not jurisdictional. That is outside the scope of the rulemaking. There is no existing ground-truthed wetland, stream, or water body mapping that comprehensively covers the entire area and thus no source of data from which to determine such metrics." EPA, Clean Water Rule Response to Comments, Topic 12: Implementation Issues, at 29 (undated), http://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_12_implementation.pdf.

Abbott Labs., 387 U.S. at 150 (summarizing the facts in *Frozen Food Express*).

Similarly, disputes about the validity of the Rule will most often arise in enforcement actions, or through challenges to Corps jurisdictional determinations ("JDs") or Section 1344 permits once the facts have been crystallized.[8] These challenges are all subject to district court review under the Administrative Procedure Act. And the district courts are well equipped to consider the applicability of a broad based definitional rule to a specific land or water feature. Indeed, all other challenges to the application of the definition of WOTUS have originated in the district courts. See, *e.g.*, *Rapanos* v. *United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Further, despite the government's laser focus on the NPDES program, disputes about CWA jurisdiction are far less likely to arise in the context of challenges to the issuance or denial of NPDES permits (indeed, EPA has no

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[8] The CWA is a strict liability statute. See UWAG Br. at 19-20. In addition to civil and criminal penalties, EPA and the Corps also have powerful administrative enforcement tools such as compliance orders, notices of violation, and cease-and-desist orders, 33 U.S.C. § 1319(a); 33 C.F.R. § 326.3(c), and can assess administrative penalties up to $187,500. 78 Fed. Reg. 66,643 66,647 (Nov. 6, 2013) (citing 33 U.S.C. § 1319(g)(2)(B)). Accordingly, entities conducting any kind of activity on the landscape must tread lightly, taking care to identify any areas that may be deemed "navigable waters" and either avoiding such areas or obtaining a permit if they plan to discharge to them.

separate process for determining jurisdiction in the NPDES-permitting context).

Accordingly, a functional approach favors district court review of the WOTUS Rule. Rather than create a "perverse situation," as the government asserts, Fed. Resp'ts' Br. at 13, 14, 36, 38, district court review of the WOTUS Rule would result in the more functional framework where individual enforcement actions and challenges to JDs, as well as review of the WOTUS Rule – "the basic regulation[] governing those individual actions" – are reviewable by the district courts.

III. Limiting Review Under Section 1369(b)(1) Would Raise Significant Concerns for the Regulated Community and the Public

Limiting the WOTUS Rule to direct circuit court review under Section 1369(b)(1) would raise significant due process concerns. See UWAG Br. at 16-21. The government claims that applying Section 1369(b) "promotes the ability of the regulated community, regulators, and the public to rely on the validity of agency actions that are not promptly challenged or that are upheld by a court of appeals." Fed. Resp'ts' Br. at 4. As the Agencies and the courts have acknowledged, however, given the breadth and ambiguity of the Rule, a member of the public cannot identify what lands and waters constitute WOTUS subject to CWA regulation unless he seeks a JD or permit from the Agencies.

"[T]he transition from water to solid ground is not necessarily or even typically an abrupt one . . . [w]here on [the] continuum to find the limit of 'waters' is far from obvious." *Riverside Bayview Homes, Inc.*, 474 U.S. at 132. While "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property," *Hawkes Co.* v. *U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring), *aff'd*, 136 S. Ct. 1807 (2016), the CWA is an exception. Indeed, even the Corps recognizes that a layperson cannot confidently identify WOTUS by himself. See James S. Wakeley, U.S. Army Corps of Eng'rs, Eng'r Research & Dev. Ctr., ERDC/EL TR-02-20, Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations, 13 (Aug. 2002), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/dev_reg_wetlands.pdf, (wetland conditions "may not be directly observable in the field and may require long-term study or specialized training and equipment to evaluate [] a particular site."). But, as many members of the public can attest, even hiring an expert will not provide comfort because the Agencies may not agree with the expert, and, moreover, the Agencies may wrongly assert CWA jurisdiction.[9]

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[9] For example, after this Court's unanimous decision finding that JDs are final agency action subject to immediate judicial review, *Hawkes* was remanded to the district court for review of the JD. *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016). The district court found that the Corps lacked suf-

The exact scope and application of the WOTUS Rule to a particular feature will not be known until the Agencies determine and apply the WOTUS Rule to that feature. Accordingly, potentially regulated parties have no notice until that time whether the WOTUS Rule applies to their property or how they may be injured by the Agencies' promulgation of this Rule. This lack of notice is compounded by the fact that the Rule purports to define WOTUS for the entire CWA.[10] Rather than promoting regulatory certainty, if review is only to be had in circuit courts, individuals who may be unaware of the Rule and its potential applicability to their particular site could be barred from judicial review entirely.

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ficient evidence to assert CWA jurisdiction over Hawkes' property, set aside the JD, and enjoined the Corps from exercising CWA jurisdiction over the parcel. *Hawkes Co* v. *U.S. Army Corps of Eng'rs*, No. 13-107 ADM/TNL, 2017 WL 359170 (D. Minn. Jan. 24, 2017).

[10] Such a decision would also have significant ramifications for various scenarios that have not been developed in the administrative record for the WOTUS Rule. EPA does not purport to have looked at every waterbody in issuing the Rule, and specific determinations of jurisdiction over those waterbodies would be reviewed based on a different record (specific to that waterbody) than the one that is before the Sixth Circuit on petitioners' facial challenge to the WOTUS Rule.

CONCLUSION

For the foregoing reasons, and as explained by the States and NAM, UWAG respectfully requests that the Court reverse the judgment of the Court of Appeals.

September 11, 2017

Respectfully submitted,

Kristy A. N. Bulleit
Counsel of Record
ANDREW J. TURNER
KARMA B. BROWN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
kbulleit@hunton.com
(202) 955-1500
Counsel for Respondent
Utility Water Act Group

RECORD AND BRIEFS.

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In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF STATE RESPONDENTS OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, THE NEW MEXICO STATE ENGINEER, THE NEW MEXICO ENVIRONMENT DEPARTMENT, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
PETER T. REED
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov
Counsel for Respondent State of Ohio

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The State Respondents' opening brief showed that Subsections (E) and (F) of 33 U.S.C. § 1369(b)(1) do not grant circuit jurisdiction over the rule adopting an expansive definition of "waters of the United States" for the Clean Water Act. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("the Rule"). *First*, this case should begin and end with the plain text. The Rule does not promulgate an effluent limitation or other limitation under § 1311, 1312, 1316, or 1345, or issue or deny a permit under § 1342. State Resp. Br. 19-33. *Second*, § 1369(b)(1)'s structure confirms this reading. The provision precisely identifies seven actions subject to circuit review, so a broad reading of Subsections (E) and (F) would render other subsections superfluous and cover actions that Congress excluded from its reach. *Id.* at 34-38. *Third*, two interpretive presumptions support this reading. The Court presumes that Congress means for clear jurisdictional rules, and the plain text provides the clearer rule. The Court also presumes that Congress means to authorize judicial review of agency actions, but a broad reading of the subsections would increase restrictions on that review. *Id.* at 38-49.

In response, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, "the Agencies") seek to muddy the clear statutory language by emphasizing policy concerns and legislative history that, in the end, do not even support their reading. The Court should reject their arguments, follow § 1369(b)(1)'s plain text, and hold that district courts have jurisdiction over suits challenging the Rule.

A. The Agencies Cannot Show That The Rule Fits Within Any Reasonable Reading Of Subsection (E) Or (F)

The Agencies begin by mistakenly arguing that Subsections (E) and (F) can be interpreted to cover the Rule. U.S. Br. 17-34.

1. The Agencies read the word "limitation" in isolation, not in the context of the entire Subsection (E)

As the State Respondents showed (at 19-29), the Rule does not fall within Subsection (E) because it does not "promulgat[e]" any "effluent limitation or other limitation" "under section 1311." The Rule does not announce the technology-based restrictions that § 1311 directs the EPA to promulgate. Instead, it defines a phrase that is referenced only in § 1362(7) pursuant to, if anything, the EPA's general rulemaking authority in § 1361(a).

In response, the Agencies argue that Subsection (E) covers EPA actions that "impose limitations of any sort under Section 1311." U.S. Br. 17. The Rule satisfies that test, they continue, because "[a] rule that specifies which sites are 'waters of the United States' imposes on persons who discharge pollutants to those waters the full panoply of effluent and other limitations under Section 1311." *Id.* at 19. This reading suffers from three distinct problems: (a) it asks whether an EPA action has the practical effect of triggering limitations found elsewhere, rather than whether the action itself promulgates a limitation; (b) it reads "any effluent limitation or other limitation" to mean "any limitation"; and (c) it treats all actions that affect § 1311 as issued under § 1311.

a. *Promulgate Limitations v. Affect Limitations.* The Agencies argue that Subsection (E) reaches regulations that have a "practical effect" of "impos[ing]" the limitations found in *other* provisions, such as the pollutant-discharge limitation in § 1311(a). U.S. Br. 19. They are mistaken.

Subsection (E)'s language does not permit this practical-effect test. Even if the Agencies correctly read "any effluent limitation or other limitation" to mean "any limitation," *but see infra* Part A.1.b, the Rule still cannot be said to have *promulgated* the "panoply of effluent and other limitations under Section 1311" on which the Agencies rely. U.S. Br. 19. Congress promulgated § 1311(a), and other rules promulgate the limitations that § 1311 directs the EPA to issue. As the Rule admits, it does not "establish" (i.e., promulgate) "any regulatory requirements" (i.e., any limitations). 80 Fed. Reg. at 37,054.

The Agencies' own statements prove that their test does not fit the text. They studiously avoid the word "promulgate," saying instead that Subsection (E) covers actions that "impose[]" limitations. U.S. Br. 16; *id.* at 17-19. They do so because "impose" has a wider range of meanings than "promulgate." The Agencies' Rule uses the word in a narrower sense, saying that the Rule "*imposes* no enforceable duty." 80 Fed. Reg. at 37,102 (emphasis added). The Agencies' Brief now uses the word in a broader sense, saying that the Rule "*imposes* . . . the full panoply of effluent and other limitations under Section 1311." U.S. Br. 19 (emphasis added). Only the former respects Subsection (E)'s text. Because the rule does not issue "regulatory requirements" or "enforceable

dut[ies]," 80 Fed. Reg. at 37,054, 37,102, it does not promulgate limitations.

The Agencies' practical-effect test also reads out Subsection (E)'s other verb. That subsection covers state-issued limitations that are "approv[ed]" by the EPA, and limitations that are "promulgat[ed]" by the EPA. Thus, promulgate must have a precise meaning reaching actions *directly* issuing limitations; a broader meaning would leave approve without independent force. *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 670-71 (7th Cir. 1991). The Agencies' reading proves this point: An approval of a state limitation has the "practical effect" of imposing that limitation, so it would qualify as "promulgating" a limitation under the Agencies' boundless reading.

Given that the practical-effect test does not fit Subsection (E), the Agencies cannot justify that test by noting that the adjective "any" precedes "effluent limitation or other limitation." U.S. Br. 18. That adjective cannot change the meaning of the verb "promulgate," the noun "limitation," or the prepositional phrase "under section 1311." In that respect, the Agencies "err[] in placing dispositive weight on the broad statutory reference to 'any' . . . without considering the rest of the statute." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994). While "any" can broaden an object, it cannot "transform[]" the "clear meaning" of the clause *as a whole*. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). Subsection (E)'s text means something different from the language that the Agencies need for their reading ("affecting any limitation within section 1311").

For the same reason, the Agencies get nowhere by extensively quoting statements by the Rule's chal-

lengers protesting its expansive scope. U.S. Br. 19-22. That the Rule would require landowners to seek more permits (and States to process more) might be relevant under a test tied to a regulation's practical consequences. But Subsection (E) reaches rules that issue restrictions, not rules that affect restrictions. In fact, the Agencies' reliance on these quoted statements shows how unworkable their test would be. Jurisdiction should not turn on whether a rule expands the covered waters (subjecting more lands to § 1311's limits) or contracts the covered waters (exempting more lands from § 1311's limits). *Hertz Corp. v. Friend*, 559 U.S. 77, 94-95 (2010). The Agencies concede this point in a footnote, one that conflicts with their repeated reliance on the Rule's breadth. U.S. Br. 21 n.4. As their footnote explains, an EPA-issued "effluent limitation" falls within Subsection (E) even if it lessens discharge restrictions as compared to earlier restrictions. That is because the subsection does not adopt a practical-effect test; it "turns on the nature of the challenged EPA action." *Id.* The action *itself* must promulgate restrictions.

Comparing statewide and county-wide "blue laws," the Agencies also mistakenly argue that the Rule's "effort to identify" where § 1311's limitations apply qualifies as a limitation under "common usage." U.S. Br. 20-21. But it is not common to say that an action *interpreting* a phrase has *promulgated* a limitation. This Court would not commonly say, for example, that it "promulgated" a "limitation" "under" the Racketeer Influenced and Corrupt Organizations Act when it read that law to apply extraterritorially. *RJR Nabisco Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101-06 (2016). Nor would it say that it promulgated a limitation under § 1311 when it interpret-

ed the Clean Water Act not to reach "an abandoned sand and gravel pit." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) ("*SWANCC*").

The Agencies next wrongly compare the Rule to a general effluent limitation on a point-source *class*, noting that neither action is "self-executing." U.S. Br. 22-24. Whether or not an EPA action must promulgate a "self-executing" limitation, it still must promulgate a limitation. And general effluent limitations issue restrictions because dischargers generally must follow them to obtain permits. 33 U.S.C. § 1342(a). The Rule does not issue restrictions. 80 Fed. Reg. at 37,054. In this respect, the Agencies ignore the State Respondents' argument (at 25-26) that the Act's other uses of "effluent limitation or other limitation" treat the promulgated action as something that itself can be *violated*. *E.g.*, 33 U.S.C. § 1365(a), (f). Effluent limitations satisfy this criterion in a way that the definitional Rule does not.

b. *Effluent or Other Limitation v. Any Limitation.* The Agencies suggest that "any effluent limitation or other limitation" means "any limitation." U.S. Br. 24-28. This debate is an academic one in this case. Even if Subsection (E) reached "any limitation," it would not cover the Rule for the reasons explained above and below. The EPA action must be the restriction, and it must be of a kind that § 1311 directs the EPA to impose. Yet the Agencies rely on restrictions found outside the Rule, and identify nothing in § 1311 giving them the authority to adopt it.

Regardless, as the State Respondents noted (at 21-22), "other limitation" is best read to reach only restrictions that are "directly related to effluent limi-

tations" in that they "direct[]" the *regulated community* "to engage in specific types of activity." *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 877 (7th Cir. 1989). This phrase at least excludes the alleged practical limitations on *permitting authorities* on which the Agencies rely. U.S. Br. 21-22. The Agencies' responses lack merit.

They initially reject both *ejusdem generis* and *noscitur a sociis*, suggesting that neither can apply to a list that includes only two items (like "effluent limitation or other limitation"). U.S. Br. 24-27. They mistake "the fairly technical *ejusdem generis* canon for the somewhat less technical associated-words canon" (*noscitur a sociis*). Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 206 (2012). While "most associated-words cases involve listings," a listing is not a "prerequisite." *Id.* at 197; *Gutierrez v. Ada*, 528 U.S. 250, 254-55 (2000); *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 242 (D.C. Cir. 2013). That is because *noscitur a sociis* is not a technical canon; it is a "commonsense canon." *United States v. Williams*, 553 U.S. 285, 294 (2008). It is "an interpretive rule as familiar outside the law as it is within, for words and people are known by their companion." *Gutierrez*, 528 U.S. at 255. Here, commonsense suggests that Congress would not have said "any effluent limitation or other limitation" if it meant "any limitation." *Cf. MBIA*, 708 F.3d at 242.

The Agencies retort that Congress often places a specific phrase before a general one "for emphasis or clarity." U.S. Br. 27. In the cases that they cite, however, the Court recognized a *reason* for Congress to have done so. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008), illustrates this point. That case

considered an exception to the federal government's waiver of sovereign immunity for the detention of property by "'any officer of customs or excise or any other law enforcement officer.'" *Id.* at 216 (citation omitted). The Court read "any other law enforcement officer" broadly to reach law-enforcement officers "of whatever kind." *Id.* at 220. This reading did *not* render the specific phrase ("any officer of customs or excise") superfluous, the Court added, because "Congress may have simply intended to remove any doubt that officers of customs or excise were included in 'law enforcement officers.'" *Id.*

In this case, by contrast, the Agencies offer no explanation why Congress would say "effluent limitation" apart from "other limitation" if it meant "any limitation." Unlike in *Ali*, they cannot argue that "any limitation" could be read to exclude effluent limitations. Section 1311's title is "effluent limitations." There is no reason for Congress to have said "effluent limitation or other limitation" (a phrase suggesting that Congress had specific restrictions in mind) if it intended the breadth that the Agencies seek.

c. *Under § 1311 v. Affecting § 1311.* The Agencies claim that they issued the Rule "under section 1311" because its "effect is to make effluent and other limitations under Section 1311 applicable to" covered waters. U.S. Br. 28. While the meaning of the word "under" depends on context, *Kucana v. Holder*, 558 U.S. 233, 245 (2010), the Agencies do not fit their practical-effect test within any definition of "under section 1311." That phrase naturally reaches limitations issued "according to" the authority of § 1311. *Black's Law Dictionary* 1368 (5th ed. 1979). Section 1311, for example, lists restrictions set "by the Ad-

ministrator." *See* 33 U.S.C. § 1311(b)(1)(A)-(B), (b)(2)(A), (b)(2)(E), (m), (n), (p); *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, 126-36 (1977). That § 1311 directs the EPA to issue many limitations—but contains no authorization for the EPA to clarify the boundaries of "waters of the United States"—shows that the EPA did not issue the Rule "under section 1311."

The Agencies also do not adequately respond to the Rule's universal scope. If a regulation affects § 1311, they argue, it issues under § 1311 even if it affects *every other section*. U.S. Br. 28-29. This confirms that the Agencies' test lacks a limiting principle. They recognize that nearly the entire Act relates to § 1311, describing that section as "central to the Act" and as its "'first principle.'" U.S. Br. 2 (citation omitted). The Agencies' test thus could sweep in nearly all actions into Subsection (E). Looking only at § 1311's cross-references as a barometer of items that might "affect" the section, the Agencies' reading could apply to rules about §§ 1251, 1281, 1283, 1284, 1312, 1313, 1314, 1316, 1317, 1325, 1328, 1342, 1343, 1344, and 1370. That reading does not comport with Subsection (E)'s demarcation of four specific sections.

Indeed, the Agencies next agree that the Court cannot read Subsection (E) broadly to encompass all EPA actions, identifying some that, they say, do not fall within the subsection. U.S. Br. 29-30. But the Agencies merely list these actions; they do not explain how the actions fall outside their broad reading of Subsection (E). Two of their examples show that the Agencies must switch to an altogether *different* reading of Subsection (E) to exclude these actions.

Example One: The Agencies claim that the Rule qualifies as a limitation "under section 1311" because it "imposes . . . the full panoply of effluent and other limitations under Section 1311." U.S. Br. 19. They later claim that the compliance order in *Sackett v. EPA*, 566 U.S. 120 (2012)—which determined that specific lands were subject to the Act and so imposed § 1311's limits, *id.* at 124-25—does not qualify as a limitation "under section 1311" because the order "does not *itself* approve or promulgate effluent or other limitations under Section 1311." U.S. Br. 30 (emphasis added). Instead of distinguishing the Rule from the order under a *uniform* reading of Subsection (E), the Agencies adopt *different* readings for the two actions. They invoke a broad reading of Subsection (E) to reach the Rule (asking whether the Rule affects § 1311 limits), and a narrower reading of Subsection (E) to exclude the order (asking whether the order itself promulgates § 1311 limits).

Example Two: The Agencies claim—consistent with their traditional view—that Subsection (E) does not "reach EPA's decisions approving state water-quality standards" under § 1313. U.S. Br. 29. Yet their current position contradicts the interpretive principles on which they have relied for their traditional position. Here, the Agencies claim that they issued the Rule "under section 1311" because § 1311 references the phrase "waters of the United States" in a roundabout way: That phrase is the definition of another phrase ("navigable waters") that is in the definition of a third phrase ("discharge of any pollutant") that is used in § 1311(a). 33 U.S.C. §§ 1362(7), (12). There, the EPA argued that water-quality standards are *not* issued "under Section 1311" even though they are referenced in § 1311(b)(1)(C).

Friends of the Earth v. EPA, 333 F.3d 184, 188-89 (D.C. Cir. 2003). To reach that position, it invoked arguments that the Agencies now disregard, such as the requirement to read § 1369(b)(1) as a whole, *id.* at 189, and the rule against superfluity, *id.* at 190.

In sum, the Court should reject the Agencies' "chameleon"-like reading of § 1369(b)(1), whose meaning depends on the action under review. *Cf. Clark v. Martinez*, 543 U.S. 371, 382 (2005).

2. The Agencies make no attempt to fit the Rule within Subsection (F)'s text

As the State Respondents showed (at 30-33), the Rule does not fall within Subsection (F) because it does not issue or deny a permit under § 1342. In response, the Agencies spend no effort on Subsection (F)'s text, identifying no meaning of "issuing" or "denying" a "permit" that covers the Rule. U.S. Br. 30-34. That omission violates basic principles. Interpretation "begin[s], as [it] must, with a careful examination of the statutory text." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017); *Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017). The Agencies do not do so here.

Instead, they begin with *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), which held that the EPA veto of a state-issued permit was the denial of a permit. They read that case as adopting a "functional interpretive approach" *unmoored* from the text. U.S. Br. 31. Yet *Crown Simpson* tied its holding to a reasonable reading of Subsection (F) *before* considering the functional concerns that the Agencies advance. It noted: "When EPA, as here, objects to effluent limitations contained in a state-issued permit,

the precise effect of its action is to 'den[y]' a permit within the meaning of" Subsection (F). 445 U.S. at 196. The Agencies disregard this portion of the opinion by highlighting only the portion that discusses pragmatic concerns. It is thus the Agencies that depart from *Crown Simpson*'s "'rationale'" and "abrogate" its "framework." U.S. Br. 32-33 (citation omitted). A case's rationale consists of all of its reasoning, not half of it.

The Agencies next portray the circuit courts as "generally" supporting their reading of Subsection (F). U.S. Br. 32. But *NRDC, Inc. v. EPA*, 656 F.2d 768, 776 (D.C. Cir. 1981), did not find jurisdiction under Subsection (F); it relied on Subsection (E). Then, in opinions with little reasoning, *American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992), and *NRDC, Inc. v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992), misread that opinion as holding that Subsection (F) covers rules affecting permitting. The Ninth Circuit has narrowed those opinions. *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1016-18 (9th Cir. 2008). Yet *National Cotton Council of America v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009), simply cited the Ninth Circuit cases with "no analysis" on Subsection (F)'s text. *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012). That case was then rejected by *Friends of the Everglades*. In short, the Agencies' view of *Crown Simpson* has not "shaped lower-court case law." U.S. Br. 34.

The Agencies lastly claim that their reading of Subsection (F) does not render other subsections in § 1369(b)(1) superfluous. U.S. Br. 33-34. Congress would not have felt the need to adopt a separate subsection for regulations like the Rule, they argue, be-

cause Subsection (F) "naturally" covers a rule defining "waters of the United States." *Id.* at 33. In contrast, they say, Subsection (F) does not "clearly" reach the standards of performance referenced in Subsection (A) or the pretreatment standards referenced in Subsection (C) because those actions "do not dictate whether a permit may be issued at all." *Id.* at 34. This distinction requires the Agencies to characterize as "natural[]" an interpretation that has been described as "illogical and unreasonable." Pet. App. 29a (Griffin, J., concurring in judgment). The distinction also does not work because § 1342(a) makes compliance with the referenced standards a "condition" for the "issu[ance]" of a permit, so these standards do dictate whether a permit may issue. And the distinction's nebulous nature creates an enigmatic jurisdictional test for Subsection (F). *Cf. Hertz*, 559 U.S. at 94-95. There is nothing "natural" about it.

B. The Agencies' Purpose Arguments Do Not Permit Departure From The Text

The Agencies argue that their view comports with three purposes that they glean from § 1369(b)(1): (1) facilitating expedited review; (2) promoting uniformity for national rules; and (3) preventing irrational bifurcation of the review of related actions. U.S. Br. 35-40. These arguments fail.

As a general matter, "[v]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 136 S. Ct. 651, 661 (2016) (citation omitted). In this case, "'even the most formidable argument concerning the statute's purposes could not overcome the clarity'" of

§ 1369(b)(1)'s text. *Nichols v. United States*, 136 S. Ct. 1113, 1119 (2016) (citation omitted).

As a specific matter, the Agencies' purpose arguments are not "formidable." Their first "purpose" undermines their reading of § 1369(b)(1), and the other two do not qualify as "purposes."

1. *Expedited Review.* The Agencies note that § 1369(b)(1) is designed to "facilitate[] quick and orderly resolution of disputes." U.S. Br. 35. True enough. But this purpose cuts *against* them. Their reading "produces a 'vague and obscure'" jurisdictional boundary. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015) (citation omitted). The Agencies' failed attempts to distinguish the Rule from actions like the compliance order in *Sackett* show this lack of clarity. If this Court accepts their reading, "careful counsel" would indefinitely have to bring duplicative challenges. *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977). That would harm the statute's efficiency purpose.

As the State Respondents noted (at 38-43), this purpose instead supports the plain text. It represents one application of the Court's general presumption that Congress means to set "straightforward" jurisdictional rules. *Hertz*, 559 U.S. at 94. It speaks volumes that the Agencies do not cite cases like *Hertz* or discuss the Court's "practice of reading jurisdictional laws, so long as consistent with their language, . . . to establish clear and administrable rules." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567-68 (2016).

2. *National Uniformity.* The Agencies suggest that Congress designed § 1369(b)(1) to send *broad* EPA actions to the circuit courts because of the need for "'national uniformity,'" while relegating *local* EPA actions to the district courts given the lack of such a need. U.S. Br. 35, 38 (citation omitted). This alleged purpose cannot guide the reading of § 1369(b)(1). To identify a "purpose" of a statute, a party must ground that purpose in the statute's text. After all, "the best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98 (1991); Scalia & Garner, *supra*, at 56.

The Agencies do not derive this purpose from § 1369(b)(1). Its text both includes *and* excludes national *and* local actions. On one hand, § 1369(b)(1) sends many *local* actions to circuit courts. Subsection (F) requires an applicant to seek circuit review of an individual permit decision. And Subsection (G) requires circuit review of individual control strategies. On the other hand, § 1369(b)(1) does not cover all national rules. It does not "provide for judicial review of" general guidelines that § 1314 directs the EPA to issue. *E.I. du Pont*, 430 U.S. at 124-25. And it does not provide for review over national rules about the hazardous-substance provisions in § 1321 or vessel-waste provisions in § 1322. U.S. Br. 29. If Congress had intended for circuit review over all national actions, it would have enacted a provision like the Clean Air Act's jurisdictional provision, which directs *national* actions to the D.C. Circuit and *local* actions to regional circuits. 42 U.S.C. § 7607(b)(1). But § 1369(b)(1) does not resemble that provision.

3. *Irrational Bifurcation.* Citing *E.I. du Pont* and *Crown Simpson*, the Agencies argue that § 1369(b)(1) should be read "so that intertwined agency actions are routed through the same channels." U.S. Br. 35. They argue that it would be irrational for district courts to review the Rule because circuit courts review effluent limitations and permits. *Id.* at 38. This argument misreads *E.I. du Pont* and *Crown Simpson* as allowing practical concerns to trump text. As noted, both held that the challenged EPA actions fell within the text before invoking practical concerns. *Crown Simpson*, 445 U.S. at 196; *E.I. du Pont*, 430 U.S. at 136. The Agencies elsewhere concede that the text must control such concerns. They note that the EPA's *approval* of a state-promulgated individual control strategy under § 1314(l) does not fall within Subsection (G), even though the EPA's *promulgation* of an individual control strategy does. U.S. Br. 29. These actions are as "intertwined" as they come, but review takes place across separate courts because the text requires that result. *Cf. Roll Coater*, 932 F.2d at 671.

Regardless, district-court review of the Rule does not create "irrational bifurcation." U.S. Br. 38. The Agencies claim that challenges to their determinations that certain lands are "waters of the United States" invariably originate in *circuit court* after a permit ruling under Subsection (F). *Id.* To the contrary, this Court's recent cases implicating those decisions have all originated in *district courts*. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812-13 (2016); *Sackett*, 566 U.S. at 123-25; *Rapanos v. United States*, 547 U.S. 715, 729 (2006) (plurality op.); *SWANCC*, 531 U.S. at 165. Thus, even if a challenge to a "categorical" agency resolution should

begin in the same court as a challenge to a landowner-specific agency resolution, challenges to the Rule belong in district court. U.S. Br. 31.

C. The Agencies' Legislative-History Arguments Also Do Not Permit Departure From The Text

The Agencies argue that the legislative history from three different periods supports their argument that Subsections (E) and (F) cover the Rule. U.S. Br. 40-48. This argument fails for the same reasons that their purpose arguments fail.

To begin with, "'reliance on legislative history is unnecessary in light of the statute's unambiguous language.'" *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) (citation omitted). "As [the Court has] repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). Because Subsections (E) and (F) are clear, the Court has no need to invoke legislative history.

In all events, the Agencies' legislative history offers no significant insights into the meaning of Subsections (E) and (F).

1. *1971-72 Reports.* The Agencies argue that the Clean Water Act's committee and conference reports "suggested that Section 1369(b)(1) encompasses *every* nationwide regulation that the [EPA] issues under the" Act. U.S. Br. 42. The quoted statements suggest no such thing. The Senate Report indicated that "[o]ne of the uncertainties in the existing [law] is the availability or opportunity for judicial review of administratively developed and promulgated require-

ments, standards and regulations." S. Rep. 92-414, at 84-85 (1971). This passage did not identify the regulations that the new provision would cover, let alone indicate that it would cover them all. In fact, the Senate Report described § 1369(b)(1) as "specif[ying] the courts in which *certain appeals* may be prosecuted." *Id.* at 84 (emphasis added). The House Report was even clearer. It spelled out each action covered by § 1369(b)(1), and added that the section does not "exclude judicial review under other provisions of the legislation that are otherwise permitted by law," such as through the Administrative Procedure Act. H.R. Rep. 92-911, at 136 (1972).

Even if these reports suggested that § 1369(b)(1) covered *all* national rules, they would contain, as the Agencies concede, an "imprecise" summary of the section. U.S. Br. 42-43. It is hard to see why such an inaccuracy should say anything about § 1369(b)(1). Justices "who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text." *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011). They do "not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Id.* That is what the Agencies seek to do here with their reliance on "imprecise" (i.e., ambiguous) history.

2. *1987 Change.* The Agencies next suggest that Congress, in 1987, acquiesced in their broad reading of Subsections (E) and (F) by passing amendments to § 1369(b)(1) "without narrowing its scope." U.S. Br. 44 (citing Water Quality Act of 1987, Pub. Law No. 100-4, 101 Stat. 7). Even if Congress acquiesced in *E.I. du Pont* and *Crown Simpson*, it did not agree to the Agencies' *misreading* of them. If anything, these

amendments show that the Agencies do not read those cases correctly because the amendments would serve no purpose under the Agencies' view. Congress made two changes: It added sewage-sludge limitations under § 1345 to Subsection (E), and it adopted Subsection (G) for the promulgation of individual control strategies. 101 Stat. at 39, 73. If rules affecting the "permitting process" were *already* covered, however, Congress had no reason to add these provisions. After all, the sewage-sludge regulations and individual control strategies establish permit conditions. 33 U.S.C. §§ 1314(l)(1)(D), 1345(a)-(b). So the EPA's reading of Subsections (E) and (F)—which would cover these permit-affecting actions—renders these amendments "a largely meaningless exercise." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006).

3. *1977 Debate.* The Agencies lastly argue that a floor debate about an unenacted amendment to § 1369(b)(1) during the 95th Congress supports their broad reading of the enacted section passed by the 92nd Congress. U.S. Br. 44-48. The Court should reject their pages of "1977 'history' about a 1972 law." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312 (9th Cir. 1992). The Court has "'observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.'" *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994) (citation omitted). It has added that "[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *United States v. Craft*, 535 U.S. 274, 287 (2002) (citation omitted)); *SWANCC*, 531 U.S. at 169-

70. The Agencies' arguments join both problematic methods. An after-the-fact debate about § 1369(b)(1) *generally* does not help discern the *specific* meaning of the text in Subsections (E) and (F).

D. The Agencies Wrongly Favor A Presumption Of Circuit Review Over Established Interpretive Canons

The Agencies claim that *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), created a presumption favoring circuit review for statutes that divide jurisdiction between circuit and district courts. U.S. Br. 48-49. They overread that case.

To begin with, *Florida Power* confirms that the Agencies' presumption provides no basis to depart from § 1369(b)(1)'s text. While the Court stated that it "will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals," it added that "[w]hether initial subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress and not by any views we may have about sound policy." 470 U.S. at 745-46. That is, policy rationales cannot override § 1369(b)(1)'s language.

Even if § 1369(b)(1) were ambiguous, the canons that the State Respondents invoked (at 38-49) would prevail over this presumption. *Florida Power* relied on efficiency concerns to describe the "sound policy" of circuit review. 470 U.S. at 745. Yet the statute there contained no provision like § 1369(b)(2), which forecloses later judicial review over actions falling within § 1369(b)(1). And the "presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 566 U.S. at 130.

Indeed, the D.C. Circuit, which the Agencies cite as having adopted their circuit-favoring presumption, U.S. Br. 48, rejected it in a case involving the Noise Control Act precisely because of that law's similar review-preclusion provision. *Chrysler Corp. v. EPA*, 600 F.2d 904, 911-13 (D.C. Cir. 1979).

The Agencies respond that challengers who later confront § 1369(b)(2)'s judicial-review restriction may assert constitutional challenges *at that time*, so the presumption favoring judicial review (and the canon of constitutional avoidance) should not affect the Court's reading *now*. U.S. Br. 49. Not so. If an ambiguous statute could be read to restrict judicial review in a way that raises constitutional concerns, the Court should choose an alternative reading that expands that review and lessens those concerns. "In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark*, 543 U.S. at 380. "If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81. Thus, because § 1369(b)(2) restricts judicial review and raises constitutional concerns, § 1369(b)(1) should be interpreted to lessen those concerns. *Longview*, 980 F.2d at 1313.

The Agencies respond with a footnote from *Harrison v. PPG Industries*, 446 U.S. 578 (1980), which addressed the Clean Air Act's jurisdictional provision. U.S. Br. 49. The challengers there asserted that "a literal construction" of that section—which grants broad review over *all* final action, 42 U.S.C. § 7607(b)(1)—"would violate due process of law" be-

cause of its similar judicial-review restriction. *Harrison*, 446 U.S. at 592 n.9. The footnote stated that the judicial-review restriction was "not at issue here" and that any constitutional challenge would have to "await another day." *Id.* This statement should not be read to reject the canon of constitutional avoidance. Instead, *Harrison* held only that the Clean Air Act's jurisdictional grant *unambiguously* applied to the EPA action at issue, leaving no ambiguity to resolve. *Id.* at 588-89. As Justice Powell noted, "constitutional difficulties well may counsel a narrow construction" of that section, but "no such construction [was] possible in this case." *Id.* at 594-95 (Powell, J., concurring). Section 1369(b)(1), however, is far narrower than the Clean Air Act's similar provision. Whether it reaches the Rule is—at the least—debatable. So the avoidance canon and presumption favoring judicial review counsel a narrow reading.

The Agencies' reliance on *Harrison* is ironic in a final respect. *Harrison* rejected reliance on policy arguments about the best forum for resolving disputes, noting that "this is an argument to be addressed to Congress, not to this Court." 446 U.S. at 593. The same can be said for the Agencies' position. As the State Respondents noted (at 1-2), the Court should reject their efforts to bring back the policy-based interpretive approach from *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

CONCLUSION

This Court should reverse the Sixth Circuit's holding that it has subject-matter jurisdiction under 33 U.S.C. § 1369(b)(1) over the petitions for review.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
PETER T. REED
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Respondent
State of Ohio

SEPTEMBER 2017

ADDITIONAL COUNSEL

STEVEN T. MARSHALL
Attorney General
State of Alabama

JAHNA LINDEMUTH
Attorney General
State of Alaska

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CYNTHIA H. COFFMAN
Attorney General
State of Colorado

PAMELA JO BONDI
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

CURTIS T. HILL, JR.
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

ANDY BESHEAR
Attorney General
State of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

BILL SCHUETTE
Attorney General
State of Michigan

JIM HOOD
Attorney General
State of Mississippi

JOSHUA D. HAWLEY
Attorney General
State of Missouri

TIM FOX
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

ADAM PAUL LAXALT
Attorney General
State of Nevada

LARA KATZ
Assistant General
Counsel
New Mexico
Environment
Department

GREGORY C. RIDGLEY
General Counsel
MATTHIAS SAYER
Special Counsel
New Mexico State
Engineer

WAYNE STENEHJEM
Attorney General
State of North Dakota

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

HERBERT H. SLATERY III
Attorney General
and Reporter
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia

BRAD D. SCHIMEL
Attorney General
State of Wisconsin

PETER K. MICHAEL
Attorney General
State of Wyoming

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In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD M. CLAMAGE
JED GLICKSTEIN
SAMUEL D. BLOCK
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

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The agencies abandon any pretense that statutory language justifies the judgment below that WOTUS Rule challenges belong in the court of appeals under Section 1369(b)(1)(F). They rely solely on an incorrect reading of this Court's decision in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), in which EPA denied a permit. The agencies' principal argument, that the plain language of Subsection (E) covers the WOTUS Rule, was properly rejected by the court below. So was their strained reading of *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), which involved a regulation establishing effluent limitations. The WOTUS Rule promulgates no effluent or other limitation, nor is it EPA action issuing or denying a permit. The agencies' policy reasons for asking this Court to twist plain statutory language are more than matched by countervailing considerations that favor district court jurisdiction. This Court should reverse with directions to dismiss the petitions for review.[1]

I. The Sixth Circuit Lacks Jurisdiction Under The Plain Language Of Section 1369(b)(1).

A. Subsection (E) Does Not Confer Jurisdiction.

The agencies contend that Subsection (E) authorizes court of appeals jurisdiction because the WOTUS Rule "promulgat[es] any effluent limitation or other limitation under section 1311." That position contradicts the plain language of the statute.

1. The WOTUS Rule is not a "limitation," which means a restriction or restraint imposed by EPA. NAM Br. 28-29. The agencies admitted in promulgating the

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[1] All of the NAM's fellow coalition members join this reply. See NAM Br. 1 n.1.

Rule that it "does not establish any regulatory requirements" and "imposes no enforceable duty." 80 Fed. Reg. 37,054, 37,102. As respondent States explain (at 25-26), it is impossible for landowners to violate the Rule's definition of "waters of the United States."

The agencies say the Rule is a limitation because it defines those geographic areas to which Section 1311(a) applies. But the Rule does not determine how the property may be used or whether a permit is required. See U.S. Br. 2-3 (before permit requirements apply a "pollutant" must be "added" to jurisdictional waters from a "point source"); NAM Br. 6 (a host of exclusions from permitting must be analyzed). The agencies' reading turns any definition of any element relevant to whether a permit may be needed into a "limitation" within Subsection (E).

The agencies argue (at 23) that limitations need not be self-executing, citing regulations that establish effluent limits for categories of point sources which are then imposed on dischargers through NPDES permits. But when EPA issues those effluent regulations, EPA specifies who is regulated, and it provides specific notice of the limits, restrictions, or standards that apply. Such regulations—provided they are issued under Sections 1311, 1312, 1316, or 1345—"promulgat[e] * * * effluent limitation[s]" squarely within Subsection (E).[2] The WOTUS Rule, by contrast,

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[2] The proviso that effluent rules fall under the sections listed in (E) is important. The agencies misstate (at 23) that NAM concedes that effluent guidelines issued under Section 1314(b)(1)(A) fall within (E). We do not, and EPA's position is at odds with *du Pont*. The Fourth Circuit held in *du Pont* that Section 1314(b) rules fall under (E). This Court disagreed, concluding that challenges to Section 1314(b) regulations "could probably be brought only in the District Court." 430 U.S. at 125.

"applies to the entire statute" (*Rapanos* v. *United States*, 547 U.S. 715, 742 (2006) (plurality)), exempts some waters from coverage, and requires "case-specific analysis" to determine whether many waters "are jurisdictional." U.S. Br. 6; see, *e.g.*, Dkt. 129-1 at 79-81 (explaining vagueness of the Rule's definition of "tributary"). A definition of the CWA's geographical scope—which does not tell a landowner whether a permit is required—does not "promulgate" a "limitation" in any sense of the words.

2. The agencies incorrectly assert (at 27) that "a rule setting the geographic scope of effluent limitations" is an "effluent limitation." An "effluent limitation" is a "restriction" on "quantities, rates, and concentrations" of pollutants authorized to be discharged to jurisdictional waters. 33 U.S.C. § 1362(11). "Other limitations" likewise refers to EPA actions governing authorized discharges—a point the agencies obliquely acknowledge. See U.S. Br. 3 (NPDES permits "establis[h] permissible rates, concentrations, quantities of specified constituents, or other limitations"), 11 ("[e]ffluent and other limitations under Section 1311 apply only to discharges of pollutants to 'navigable waters'").

Nor is the WOTUS Rule "directly related" to effluent limitations. U.S. Br. 27. It sets in motion a complex inquiry using vague criteria to determine whether a feature is jurisdictional. The CWA requires separate inquiry into whether a planned activity involves an addition of pollutants from a point source, and whether exclusions apply, before a permit including effluent limitations is required.

3. The agencies rest most of the weight of their argument on "other limitation." But the term "effluent limitation," in combination with Subsection (E)'s

reference to four statutory provisions that each relate to specific types of discharge limitation, cabins the scope of "other limitation." NAM Br. 29-31. The agencies (at 18) emphasize the word "any." But by contrast to the cases they cite, "any" modifies only the preceding term ("effluent limitation"), not the term at issue ("other limitation"). Moreover, "'any' can and does mean different things depending upon the setting." *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 132 (2004). This Court reads "any" narrowly when, as here, context requires. *E.g.*, *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 542-544 (2002) (constitutional avoidance canon); *Gutierrez* v. *Ada*, 528 U.S. 250, 254-255 (2000) (*noscitur* canon); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (statutory structure). Even if applied to "other limitations," in context "any" cannot expand "other limitations" beyond those that, like effluent limits, establish restrictions on authorized discharges—precisely the subject of each statutory provision cited in Subsection (E).

The agencies say (at 24-25) *ejusdem generis* does not apply because the statute is "disjunctive," with one specific term preceding the general term. But the canon can apply in that context. *E.g.*, *Nowak* v. *United States*, 356 U.S. 660, 664 (1958). And it applies even under the agencies' restrictive reading. The CWA repeatedly pairs "other limitation" with "effluent limitation" and additional terms that relate to specific restrictions on what pollutant, and how much, may be discharged—making it clear that Subsection (E)'s use of "other limitation" does not mean "all limitations of whatever kind." U.S. Br. 18; *e.g.*, 33 U.S.C. §§ 1318(a) ("any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance"), 1370 (same).

Noscitur a sociis likewise applies. Common sense suggests that Congress would not have said "any effluent limitation or other limitation" if it meant "any limitation at all." The agencies argue (at 25-26) that "other limitation" is "broad," but this Court has applied *noscitur* to similar terms. *E.g.*, *Wash. State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) ("other legal process"). *Noscitur* requires no "'string of statutory terms.'" U.S. Br. 26. See, *e.g.*, *Gutierrez*, 528 U.S. at 254-255. It applies *precisely* when one specific term precedes the general term. Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 205-206 (2012). Anyway, Subsection (E) supplies a string of terms: its listing of Sections 1311, 1312, 1316, and 1345 informs the meaning of "other limitations." See Pet. App. 30a. Each listed section regulates permitted discharges *into* jurisdictional waters (NAM Br. 30-31); they do not regulate *which* waters are jurisdictional.

The agencies speculate (at 27) that Congress paired "effluent" with "other" limitations "for emphasis or clarity." But "the same could be said of most superfluous language." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). The agencies give "effluent limitation" no emphasizing or clarifying role—the term becomes subsumed under "other limitation," and therefore unnecessary. See *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 877 (7th Cir. 1989).

4. The WOTUS Rule also is not a limitation "under section 1311." As respondent States (at 23-24) and Waterkeeper (at 15-16) explain, the Rule emanates from Section 1361(a), which grants EPA general rulemaking authority, and Section 1362(7), which defines "navigable waters." The Rule impacts "nearly every regulatory program under the Act." Waterkeeper Br. 2.

Section 1311 "unambiguously" requires EPA to promulgate technology-based effluent limitations. *Du Pont*, 430 U.S. at 127. It even references "[e]ffluent limitations established pursuant to this section." 33 U.S.C. § 1311(e). And the other statutes listed in Subsection (E)—Sections 1312, 1316, and 1345—each directs EPA to issue specific discharge regulations. None requires EPA to undertake rule-making to interpret a definitional phrase that appears in Section 1362.

The agencies' assertion (at 28) that the WOTUS Rule has the "legal and practical effect" of making an effluent limitation applicable to "waters that [it] covers" not only elides a slew of intervening steps governed by other definitions, but also sacrifices Subsection (E)'s "readily understandable" "reference" to "limitation[s] under" Section 1311 to mean numeric and similarly specific limits on authorized pollutant discharges. *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513, 516 (2d Cir. 1976). Section 1369(b)(1) cross-references *ten* CWA provisions, none of which is Section 1361(a)'s general rulemaking power or 1362(7)'s definition of the Act's geographic scope. That omission "counsels heavily against a finding of jurisdiction." Pet. App. 31a.

The agencies' reading renders superfluous Subsection (E)'s references to Sections 1312 (water-quality-based effluent limitations) and 1316 (new source performance standards). Section 1311(a) authorizes discharges that "compl[y] with" Sections "1312" and "1316." Any EPA action under Section 1312 or 1316 therefore has a "legal and practical effect" on limitations included in permits and on the scope of Section 1311(a)'s prohibition. If that were enough to trigger Subsection (E), Congress would not have listed Sections 1312 and 1316 in Subsection (E).

Nor would Congress in Subsection (G) have made Section 1314(*l*)(1)(D) individual control strategies for navigable waters impaired by toxic pollutants reviewable in the court of appeals. Those strategies, which are incorporated into NPDES permits, have a "legal and practical effect" on "effluent and other limitations under Section 1311." U.S. Br. 28; see NAM Br. 27.

Furthermore, Congress's decision *not* to list certain EPA actions in Section 1369(b)(1) would be meaningless, for Subsection (E) would encompass unlisted EPA actions. For example, EPA approval or promulgation of state water quality standards under Section 1313 has the "legal and practical effect" of requiring that effluent limitations in permits be tailored to meet those standards. 33 U.S.C. § 1313.

The agencies confidently assert (at 29) that EPA action under Sections 1314(*l*) and 1313 is not covered by Subsection (E), but on the agencies' view that any action with legal or practical effects on effluent limitations falls within (E), that assertion is false. The agencies' all-encompassing approach "makes a mess" of Subsection (E). *SW Gen.*, 136 S. Ct. at 941. It expands the categories listed in Section 1369(b)(1). And it requires parties and courts to engage in endless pre-merits inquiry into whether particular EPA action has the "legal and practical effect" of making "limitations under Section 1311 applicable." U.S. Br. 28.

This Court presumes "'that statutory language is not superfluous.'" *McDonnell* v. *United States*, 136 S. Ct. 2355, 2369 (2016). The agencies' reading makes Congress's inclusions and exclusions from Section 1369(b)(1) largely meaningless and invites continued costly debate over where jurisdiction lies.

5. The agencies' explanation of why EPA administrative enforcement orders lie outside Subsection (E) is unintelligible. They write (at 29-30) that Subsection (E) "does not reach EPA administrative enforcement orders" determining that "a landowner was violating Section 1311" (like "the order at issue in *Sackett* v. *EPA*, 566 U.S. 120 (2012)"), because "an enforcement order does not itself approve or promulgate effluent or other limitations under Section 1311." That reasoning is backwards.

The WOTUS Rule defines jurisdictional waters, but does not itself approve or promulgate any limitation. Enforcement orders, by contrast, *include* jurisdictional determinations—petitioners in *Sackett* challenged EPA's jurisdictional determination (566 U.S. at 122)—but *go further* to find a violation, order compliance, and prohibit further discharges. The agencies cannot explain why an EPA order finding a violation of Section 1311 is challenged in district court, as *Sackett* held, yet a challenge to the definitional WOTUS Rule falls within Subsection (E).

6. The agencies suggest (at 20) that the NAM and other challengers would not be complaining about the Rule were it not an effluent or other limitation. NRDC (at 18-24) goes a step further by claiming that challengers would lack standing in district court if the Rule were not a limitation on their conduct. But there is no "justiciability trap." NRDC Br. 23. Courts are free to consider subject matter jurisdiction before addressing standing. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). Yet NRDC demands that this Court consider standing before the subject-matter jurisdiction question on which it granted certiorari, and do so for a *different case* in which the district court has not yet addressed standing.

Anyway, establishing standing in the district court does not involve showing that the WOTUS Rule is an "effluent limitation or other limitation" under Subsection (E), but that the Rule injures plaintiffs in a concrete way that is redressable by striking it down. *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

The immediate legal consequence of the WOTUS Rule is that the entire CWA applies to features that fall within its definition. The NAM and its fellow plaintiffs alleged in their district court complaint that the "vague" WOTUS Rule "requires unpredictable case-by-case determinations" that leave their members unable to "know which features on [their] lands" are "jurisdictional." This deprives plaintiffs "of notice of what the law requires of them"—at risk of substantial criminal and civil penalties—and "makes it impossible for them to make informed decisions concerning the operations, logistics, and finances of their businesses." Dkt. 1 ¶¶31-32, No. 3:15-cv-165 (S.D. Tex.). Plaintiffs' members hired consultants to analyze the applicability of the Rule to their property, and must consider seeking jurisdictional determinations or applying for permits. *Id.* ¶¶34-35. Analysis of whether the definition of WOTUS may capture features of land is one element in deciding whether a permit is required for particular activities, along with "pollutant," "addition," "point source," and exclusions. But it does not follow from the fact that the WOTUS definition has practical and legal consequences for landowners that it qualifies as an "effluent limitation or other limitation" under the provisions of the CWA listed in Subsection (E).

In summary, the majority below correctly ruled that Section 1369(b)(1)(E) does not confer jurisdiction.

B. Subsection (F) Does Not Confer Jurisdiction.

1. The agencies do not pretend that the WOTUS Rule "issu[es] or den[ies] any permit under section 1342." 33 U.S.C. § 1369(b)(1)(F). That "should end the analysis." Pet. App. 39a.

The agencies (at 10, 31) say jurisdiction nevertheless exists under Subsection (F) "as construed in" *Crown Simpson*, using a "functional interpretive approach." *Crown Simpson* did not endorse that free-wheeling interpretation. It held that Subsection (F) conferred jurisdiction over EPA's veto of a state-issued permit because the veto had "the precise effect" of a permit denial. 445 U.S. at 196. Subsection (F)'s text applied: EPA *denied* the permit—but for EPA's veto, the permit would have issued. See States Br. 16 ("ordinary meaning" of "deny" is "to refuse the use of or access to"). Unlike a permit veto, the WOTUS Rule does not stop any permit from issuing. Nor does it require any permit to issue. The Rule makes no decision whatever on "particular permit applications." Waterkeeper Br. 9.

This Court should reject the agencies' request to extend *Crown Simpson* far beyond its holding and in conflict with statutory text. The agencies' invocation of reliance (at 33) is misplaced. Some courts have accepted the agencies' limitless reading of *Crown Simpson*, but others have not. *E.g.*, *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1287-1288 (11th Cir. 2012); *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1016-1018 (9th Cir. 2008); NAM Br. 39-40. The majority below understood that *Crown Simpson* does not compel a finding for the agencies. Pet. App. 39a-42a, 45a.

2. The agencies argued below that, under *Crown Simpson*, Subsection (F) reaches EPA actions "affecting the granting or denying of permits." Pet. App. 18a. They now abandon that argument, presumably recognizing that it has no stopping point and renders superfluous Sections 1369(b)(1)(A), (C), (D), (E), and (G). See NAM Br. 25-27; U.S. Br. 34. They now contend that Subsection (F), under *Crown Simpson*, reaches EPA actions "establish[ing] the boundaries of EPA's permitting authority." U.S. Br. 11, 16; *id.* at 33 ("whether EPA has jurisdiction to issue or deny a permit"). But the agencies cannot explain how a rule defining one condition of their jurisdiction to issue or deny a permit is "functionally similar" to the act of issuing or denying a permit. Rejecting that proposition obviously does not require "overturn[ing]" *Crown Simpson*. U.S. Br. 33.

Nor does the agencies' new approach address the superfluity that drove them to this retreat. For example, Section 1369(b)(1)(D) covers EPA determinations under Section 1342(b) to authorize states to administer NPDES permit programs, which have a profound effect on the role of EPA vis-à-vis states in issuing or denying permits. Subsection (D) would be superfluous on the agencies' new rewriting of (F). The agencies say (at 34) that superfluous language "serve[s] a useful purpose." But that "could be said of most superfluous language." *SW Gen.*, 137 S. Ct. at 941.

The proper reading of *Crown Simpson*—to the extent it has not been superseded by statute (see NAM Br. 23 & n.10)—is that Subsection (F) confers jurisdiction over EPA actions that issue or deny a permit or (the equivalent) decide whether a permit will or will not issue. That is the only reading that respects

Subsection (F)'s text and gives other subsections independent force.

3. The justification the agencies offer for asking this Court to rewrite "issuing or denying" an NPDES permit to mean promulgating rules addressing whether "EPA has jurisdiction to issue or deny a permit" is that Section 1369(b)(1) would otherwise "irrational[ly] bifurcat[e]" review of EPA's jurisdictional determination "in an individual NPDES permitting decision" from "EPA's resolution of the same question on a more categorical basis." U.S. Br. 12-13, 33.

That rationale invites this Court to rewrite countless jurisdictional statutes. See NAM Br. 46-47. And the bifurcation the agencies point to is no more irrational than Congress's choice to assign NPDES permit challenges to the court of appeals but Section 1344 permit challenges to district court.

But at bottom, the agencies offer a solution in search of a problem, for bifurcation is uncommon in practice. To determine whether property contains WOTUS, landowners usually seek a jurisdictional determination (reviewable in district court) rather than undertake the considerable expense of applying for a permit (reviewable in the court of appeals). See *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016). The agencies have issued 400,000 such determinations since *Rapanos*. U.S. Br. 6. And when jurisdictional determinations are made in administrative enforcement orders, those are reviewed in district court. *Sackett*, *supra*. Our interpretation puts the vast majority of challenges relating to jurisdiction in district court (where *SWANCC*, *Rapanos*, *Riverside Bayview*, *Sackett*, and *Hawkes* all began).

C. Statutory Purpose And Structure Reinforce The Plain Language.

1. The agencies contend (at 35) that the purpose of Section 1369(b)(1) is to "facilitat[e] quick and orderly resolution of disputes concerning the legality of important rules governing the scope of a regulatory scheme." But "[l]egislation" is "the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose [ ] at all costs.'" *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

Section 1369(b)(1) is one of "thousands of compromises dividing initial review of agency decisions between district and circuit courts" that "var[y] dramatically" even "within particular legislation." Mead & Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 2, 15-16 (2015). No one denies that the Corps and states play important roles in CWA's regulatory scheme, yet Section 1369(b)(1) does not cover review of their actions. No one disputes that Section 1344 permitting is important, yet Section 1369(b)(1) does not apply. And the agencies say (at 29-30) that EPA's *nationwide* regulations governing hazardous substances, vessel wastes, and construction grants fall outside Section 1369(b)(1). The agencies make no attempt to reconcile these exclusions with their view of Section 1369(b)(1)'s purpose. If quick and orderly resolution of "important rules" were Congress's purpose, it would have authorized review of all "nationally applicable regulations" under the CWA, words Congress used in the Clean Air Act. 42 U.S.C. § 7607(b)(1).

The agencies ignore Section 1369(b)(1)'s most salient feature: it enumerates seven categories of agency action using a list so precise that "Congress

refer[s] to specific subsections of the Act." *Du Pont*, 430 U.S. at 136. Many courts have confined those categories to their text because "[n]o sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992); see Waterkeeper Br. 17 & n.9.

2. The agencies say (at 40) that the NAM seeks to "render nugatory" case law interpreting Section 1369(b)(1). As explained above, our reading is in harmony with *du Pont*, *Crown Simpson*, and many courts of appeals' decisions. And we offer "a consistent and principled" rule (*ibid.*) that is easily applied in practice: read Section 1369(b)(1) textually. See *Henson*, 137 S. Ct. at 1725 (the "legislature says * * * what it means and means * * * what it says"). This will not "hinder" but *aid* "judicial efforts to resolve future jurisdictional disputes." U.S. Br. 40. The agencies' plea for court of appeals jurisdiction over actions sufficiently connected to effluent limitations or permits, by contrast, will just result in more litigation about where to litigate.

D. Legislative History Reinforces The Plain Language.

1. The agencies mischaracterize the legislative history of the 1972 Act establishing Section 1369(b). They observe (at 41) that the Senate Report characterized the Senate bill as routing to the D.C. Circuit suits against EPA "requirements, standards and regulations." S. Rep. 92-414 at 84-85 (1971). But the Senate bill did not treat all components of Section 1369(b) that way. It sent challenges equivalent to those described in Subsections (A)-(D) of the adopted version

of Section 1369(b)(1) to the D.C. Circuit, because those actions were "national in scope." *Id.* at 85. But it sent to the regional circuits challenges to "any effluent limitation under section [1311] or [1312]" or to the issuance or denial of a Section 1342 permit—essentially Subsections (E) and (F) as adopted, but without the term "other limitation"—because it viewed those EPA actions as local in nature. *Ibid.*; see Federal Water Pollution Control Act Amendments of 1971, S. 2770, 92nd Cong. § 509(b) (1971).

The Senate's approach thus contradicts the agencies' contention that Subsection (E) broadly covers national rules that can be traced, however remotely, to Section 1311(a). Ultimately, it indicates little about how a rule like WOTUS should be reviewed under the *different* Act that emerged after compromise with the House, which favored broad district court review. See H.R. Conf. Rep. No. 92-1465 at 147 (1972) (the House amendment to "Section [1369] is basically the same as the Senate bill *except that review [of EPA action lies] in the district court*").

The agencies (at 41) quote the House Report statement that Section 1369(b)(1) established "a clear and orderly process for judicial review." H.R. Rep. 92-911 at 136 (1972). That statement says nothing about *which* agency actions the House intended to fall within Section 1369(b)(1). And the agencies' vague test encourages protective filings and litigation over jurisdiction, so it is anything but clear and orderly. The agencies also ignore the House Report's statement that "[Section 1369] is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law." *Ibid.* The House intended actions, like the WOTUS Rule, that fall outside Section 1369(b)(1) to be reviewable in district courts under the APA.

The agencies (at 15) misread the Conference Report as "indicat[ing] that Section 1369(b)(1) would govern 'any suit against a federal standard.'" The Conference Report was there describing the Senate bill discussion of what became Subsections (A)-(D), not its treatment of what became Subsections (E)-(F), nor the subsequent House amendment that called for district court review, nor the compromise that emerged from conference. See H.R. Conf. Rep. No. 92-1465 at 147 (1972). Moreover, the Conference Report explained that the "conferees do not intend to, in any way, affect the right of a party for which judicial review was not available" under Section 1369(b)(1). *Id.* at 148. This language confirms Congress's intent not to have Section 1369(b)(1) apply beyond its terms.

Finally, the agencies acknowledge (at 42) that Congress's "language was imprecise" "insofar as" legislative reports suggested that "*every* nationwide regulation" would fall within Section 1369(b)(1). In other words, even on the agencies' own wishful reading of the legislative history, it does not support the line the agencies would now draw.

2. The agencies misread 1977 amendments to the CWA, which did not modify Section 1369(b)(1). Pub. L. 95-217, 91 Stat. 1566 (Dec. 27, 1977). Congress rejected the Administrative Conference of the United States' recommendation to expand original court of appeals review under Section 1369(b)(1). The agencies (at 45) quote snippets of the Conference's report but ignore its acknowledgement that "[n]ot every action of the EPA" was "reviewable in the courts of appeals" under Section 1369(b)(1). 41 Fed. Reg. 56,767-56,768 (Dec. 30, 1976). And they disregard the report's opinion that both Section 1369(b)(1) and the Clean Air Act's judicial review provisions were "inconsistent, incomplete, ambiguous, and unsound"; courts were "stretch[ing]"

their texts; "corrective amendments" were "desirable"; and "[a]ll national standards" should be reviewed by the D.C. Circuit. *Ibid.*

Senator Kennedy proposed adopting the Administrative Conference's recommendation, but other Senators opposed and tabled his amendment. 123 Cong. Rec. 26,754-26,761 (1977). The floor debate does *not* "confirm Congress's understanding" that Section 1369(b)(1) covers "nationwide regulations." U.S. Br. 44. Senator Kennedy described his amendment as "centraliz[ing] judicial review of national regulations" before the D.C. Circuit, and "defined" those national regulations to include "any regulation issued under sections [1311] or [1342]." 123 Cong. Rec. at 26,754, 26,758.

But other Senators had expressed "considerable opposition" to that expansion of Section 1369(b) in committee, where it would have been "defeated." *Id.* at 26,758, 26,760. Senator Domenici commented that "we can come to this floor with every bill that has some national significance of a regulatory manner and we can find some precedent somewhere that they have jurisdiction, and we can nickel and dime the district courts of the United States out of business." *Id.* at 26,759. The agencies deny it (at 46-47), but Senator Domenici of course was talking about the amendment. Anyway, "[s]cattered floor statements by individual lawmakers" are "'among the least illuminating forms of legislative history.'" *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1661 (2017). The undeniable fact is that the 95th Congress chose not to enact the Administrative Conference's proposal to expand Section 1369(b)(1).

That same Congress *did* enact the Administrative Conference's proposal to alter judicial review under the

Clean Air Act. See Pub. L. 95-95, § 305(c)(1)-(2), 91 Stat. 685, 776 (Aug. 7, 1977) (broadening 42 U.S.C. § 7607(b)(1) to reach "any other nationally applicable regulations" and "any other final [EPA] action" that is "locally or regionally applicable"); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 587 n.4 (1980). Congress's disparate actions confirm that Section 1369(b)(1) should be read narrowly. See NAM Br. 40, 43.

3. 1987 CWA amendments further undermine the agencies' arguments. Those amendments expanded Subsection (E) to include limitations under Section 1345 and added Subsection (G), which covers EPA's promulgation of individual control strategies for toxic pollutants under Section 1314(*l*). Pub. L. 100-4, §§ 308(b), 406(d)(3), 101 Stat. 7, 39, 73. Section 1345 requires rulemaking to restrict the discharge of sewage sludge using Section 1342 permits. 33 U.S.C. § 1345(b), (f). Section 1314(*l*) requires "establishment of effluent limitations under section 1342" to achieve water quality standards. *Id.* § 1314(*l*)(1)(D). If the agencies were correct (at 44) that Congress understood Section 1369(b)(1) to cover "rules that govern the CWA permitting process," there would have been no need for Congress to expand Section 1369(b)(1) to include these additional rules.

II. Policy Considerations Favor Interpreting Section 1369(b) Textually.

A. Interpreting Section 1369(b) Textually Promotes Jurisdictional Clarity.

The agencies never acknowledge "the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010); see NAM Br. 44-48. Their reading subverts that important goal.

The agencies ask this Court (at 17, 28) to hold that Subsection (E) "encompasses all EPA actions that impose limitations of any sort under Section 1311" or have a "legal and practical effect" on Section 1311 limitations. They offer several examples of actions that seemingly satisfy their standards but, they claim, fall outside Subsection (E)'s coverage. *E.g.*, U.S. Br. 29-30. They further ask this Court (at 31, 33) to adopt a "functional interpretive approach" under Subsection (F) that turns on what they think Subsection (F) "naturally reaches" and what is "functionally similar."

Forty-five years of experience tell us what will happen if this Court adopts those amorphous standards: "chaos." Waterkeeper Br. 6. Unsure still of which court has jurisdiction, parties will continue to file challenges in both district and circuit courts. Years will be spent litigating jurisdiction over EPA actions that fall outside Section 1369(b)(1)'s text but perhaps fall within its "manifest purposes." Pet. App. 4a. Jurisdictional doubt also will infect merits determinations, and a contrary jurisdictional decision by this Court could send the parties back to the starting gate after years of litigation.

As industry, respondent States, and most environmental parties agree, it is imperative that this Court break that cycle by reading Section 1369(b)(1) to create administrable standards. The best way to do so is by limiting Section 1369(b)(1) to its text and holding that it does not capture the WOTUS Rule.

B. A Narrow Reading Is Necessitated By Section 1369(b)'s Preclusion Provision.

A narrow reading is necessary because Section 1369(b)'s preclusion provision creates due-process and rule-of-lenity concerns and encourages "'buckshot petitions.'" NAM Br. 48-50.

The agencies do not deny that the NAM's reading would reduce the number of protective petitions. Nor do they dispute that due-process and rule-of-lenity concerns exist. They argue (at 49) that the Court should ignore those concerns *in this case* because they will "arise" only "in a future enforcement proceeding." But "a court must consider the necessary consequences of its choice." *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005). "If one of [two readings] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-381. Indeed, the rule of lenity applies in civil cases *because* of potential prejudice to future criminal defendants. *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). These principles require a narrow reading of Section 1369(b)(1) today to avoid prejudicing criminal and civil defendants tomorrow.

The agencies' reliance (at 49) on *Harrison* is misplaced. There, this Court held that Congress's 1977 amendments to the Clean Air Act unambiguously conferred jurisdiction over an EPA action without considering whether that holding created constitutional concerns. 446 U.S. at 586-594 & n.9. Justice Powell explained in his concurrence that the constitutional avoidance canon did not apply because "a narrow construction" was not "possible" given Congress's unambiguous amendments. *Id.* at 594-595.

Here, Congress did not expand the CWA's judicial review provisions when faced with the same call to do so. And the NAM's interpretation of Section 1369(b)(1) is certainly "plausible," which triggers the canon. *Clark*, 543 U.S. at 380-381. Further, this Court emphasized in interpreting "waters of the United States" that it is essential to read the CWA "as written" to avoid "significant constitutional" concerns.

Solid Waste Agency of N. Cook County v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173-174 (2001). A textual interpretation of Section 1369(b)(1), reinforced by the avoidance canon, compels reversal.

C. A Textual Reading Offers The Benefits Of Multilateral Review Of Agency Rulemaking.

The agencies do not deny that the NAM's reading of Section 1369(b)(1) will improve the quality of judicial decisions, increase the probability of correct dispositions, and aid this Court in its merits and case selection decisions. See NAM Br. 50-52; *du Pont*, 430 U.S. at 135 n.26 (extolling "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

The agencies argue (at 39) that a "Congress that placed great weight on doctrinal dialogue might have routed to district courts *all* litigation concerning EPA's administration of the CWA." The same can be said of the agencies' reading: a Congress that placed great weight on prompt review might have routed to courts of appeals *all* litigation concerning EPA's administration of the CWA. Yet Congress did not do so.

The agencies argue (at 39 n.6) that the NAM's reading would "requir[e] duplication of the identical task in the district court and in the court of appeals." But that is Congress's *default rule* for judicial review of agency action. 5 U.S.C. § 703; 28 U.S.C. § 1331. Indeed, it is the rule in *all* litigation when district courts decide questions of law or make any other determination that appellate courts review *de novo*. As a practical matter, challengers have incentives to limit the number of suits that proceed. See NAM Br. 52-54.

There are "reason[s] why Congress would have distinguished" between "the numerical aspect of effluent limitations and the geographical aspect of

those limits." U.S. Br. 39. Effluent limitations give specific notice of the restrictions that apply to a source or category of sources. The WOTUS Rule, by contrast, sets the geographic boundaries of the entire CWA. When a regulation has such profound impact on a statutory term that applies to all of the CWA's regulatory programs, Congress could rationally intend that the regulation be reviewed by district courts and sent through the regular appeals process because it is more important that judicial review be *correct* than *prompt*. The agencies would have a single panel set the law for the nation for all time, vastly increasing the probability of error.

D. The Agencies' Efficiency Arguments Are Unpersuasive.

The agencies claim (at 4) to champion the reliance interests of "the regulated community, regulators, and the public." But the regulated community, 30 States that administer much of the CWA, and many environmental organizations *oppose* the agencies' position. EPA may think *it* benefits by narrowing as much as possible the litigation it must defend; hardly anyone else sees benefits sufficient to twist Congress's scheme of review.

The agencies (at 48) say *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 (1985), rejected a "presu[mption]" of district court jurisdiction whenever Congress also grants courts of appeals jurisdiction to review agency action. That is incorrect. *Florida Power* interpreted "ambiguous" judicial review provisions governing the Nuclear Regulatory Commission and stressed that jurisdiction is "governed by the intent of Congress and not by any views we may have about sound policy." *Id.* at 737, 746. "[N]owhere" in its "lengthy exegesis of those specific statutes" did this

Court "intimate that it was ruling as a matter of general administrative procedure." *Nader* v. *EPA*, 859 F.2d 747, 754 (9th Cir. 1988). Regardless, "[t]he role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accor[d] with good policy." *Burrage* v. *United States*, 134 S. Ct. 881, 892 (2014).

CONCLUSION

The judgment should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted.

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD M. CLAMAGE
JED GLICKSTEIN
SAMUEL D. BLOCK
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

SEPTEMBER 2017

ECORD
AND
RIEFS

No. 16-299

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS AND U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE CHAMBER OF OKLAHOMA, TULSA REGIONAL CHAMBER, AND PORTLAND CEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
SHELDON B. GILBERT
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

WILLIAM S. CONSOVOY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

MICHAEL H. PARK
CONSOVOY MCCARTHY PARK PLLC
Three Columbus Circle, 15th Floor
New York, NY 10019
(212) 247-8006

Counsel for Amici Curiae

(For Continuation of Counsel See Inside Cover)

KAREN R. HARNED
LUKE A. WAKE
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2048

Counsel for the National Federation of Independent Business

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

members to own, operate, and grow their businesses. NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

State Chamber of Oklahoma ("State Chamber") is a non-profit organization created and existing under the laws of Oklahoma. The State Chamber represents more than 1,000 Oklahoma businesses and 350,000 employees. It has been the State's leading advocate for business since 1926. The State Chamber provides a voice for Oklahoma employers and employees in the executive, legislative, and judicial branches of government in Oklahoma.

Tulsa Regional Chamber ("Tulsa Chamber") is a non-profit organization created and existing under the laws of Oklahoma. The Tulsa Chamber serves as the primary advocate for Tulsa's business community, representing more than 3,000 employers and employees across the Tulsa region. The Tulsa Chamber promotes the interests of its members in the executive, legislative, and judicial branches of government in Oklahoma.

In July 2015, *Amici* filed a declaratory-judgment action in the U.S. District Court for the Northern District of Oklahoma, challenging the Waters of the United States Rule ("WOTUS Rule" or "Rule") on statutory and constitutional grounds. *See Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015). *Amici* alleged that the WOTUS Rule improperly extends federal regulatory authority to millions of miles

of rivers, streams, and other purely intrastate waters. *Amici* further alleged that many of their members own property that will be subject to costly and burdensome federal regulations under the WOTUS Rule. *Amici* asked the district court to hold the WOTUS Rule unlawful, to vacate and set it aside, and to enjoin its enforcement.

Although *Amici* properly filed suit in the district court, they recognized that the EPA and the Corps ("the Agencies") likely would claim that jurisdiction over their challenge belonged in the courts of appeals. If *Amici* had litigated this issue and lost, they would have forfeited their challenge to the WOTUS Rule because the deadline for filing a petition for review under 33 U.S.C. § 1369 is 120 days from the date of the EPA's action. Therefore, in an abundance of caution, *Amici* filed a protective petition for review of the WOTUS Rule in the U.S. Court of Appeals for the Tenth Circuit. *Amici*'s petition was transferred to the Sixth Circuit, where it was consolidated with similar cases.

After the Sixth Circuit issued the decision below, the district court in Oklahoma—without a motion, briefing, or hearing—issued an order *sua sponte* dismissing *Amici*'s case for lack of jurisdiction. *See State of Oklahoma ex rel. Pruitt v. EPA*, 2016 WL 3189807, at *2 (N.D. Okla. Feb. 24, 2016). Pointing to 33 U.S.C. § 1369(b)(1)(E) and (F) and the Sixth Circuit's decision, the district court summarily concluded that the courts of appeals have original jurisdiction over challenges to the WOTUS Rule. *Amici* appealed that dismissal, arguing that the district court had jurisdiction over the case and that—notwithstanding the judgment of the Sixth Circuit—the district court had an independent obligation to determine

its own jurisdiction. That case is currently pending. *See Chamber of Commerce v. EPA*, No. 16-5038 (10th Cir.).

Thus, after almost two years of litigation, *Amici* still have not had an opportunity to be heard on the merits of their claims. This delay was caused by multiple courts overlooking that courts must "apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

SUMMARY OF THE ARGUMENT

The Sixth Circuit's conclusion that Section 1369(b)(1) grants it jurisdiction over challenges to the WOTUS Rule was erroneous. Section 1369(b)(1) specifies seven categories of agency action for which a challenge must be initiated in the courts of appeals. This is not one of those cases. Subparagraph (E) grants original jurisdiction to the courts of appeals over challenges to an EPA action "in approving or promulgating any effluent limitation or other limitation." But the WOTUS Rule is not a limitation; it instead operates in conjunction with other sections of the CWA to define when its restrictions apply. Similarly, subparagraph (F) provides for original appellate jurisdiction only when the EPA has "issu[ed]" or "den[ied]" a permit to discharge pollutants into a navigable water. But there is no question that the WOTUS Rule itself did not "issue" or "deny" any permits.

Finding original jurisdiction in the courts of appeals would contravene not only the CWA's plain text, but also longstanding canons of statutory construction. Specifically, the Agencies' interpretation of Section

1369(b)(1) fails under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of the other) and the canon against surplusage. First, by giving the courts of appeals original jurisdiction over seven specific categories of EPA actions, Congress provided that those courts do not have original jurisdiction over other, unspecified EPA actions, such as promulgation of the WOTUS Rule. Second, a statute should be construed to give effect to all of its provisions. But the Agencies' sweeping construction of subparagraphs (E) and (F) would render useless the other provisions of Section 1369(b)(1).

The Agencies advocate a "practical," policy-based reading of the CWA to argue that the Sixth Circuit had jurisdiction over these disputes. Such an approach, however, finds no support in this Court's precedent, much less in the plain text of the CWA. Regardless, public policy and practical concerns favor original jurisdiction in the district courts—not in the courts of appeals. Petitioner's interpretation of the CWA would ensure that litigants are able to challenge EPA actions outside of the 120-day deadline, provide certainty over where they must bring their challenges, and allow for thorough judicial review of the WOTUS Rule. For all these reasons, the decision of the Sixth Circuit should be reversed.

ARGUMENT

I. Challenges to the WOTUS Rule Do Not Fall Within Any of the Clean Water Act's Limited Exceptions Providing for Original Jurisdiction in the Courts of Appeals.

The Court has admonished "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006). "When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). The role of the Court is to "apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

A. Section 1369(b) Makes Plain That the Courts of Appeals Lack Original Jurisdiction Over Challenges to the WOTUS Rule.

The text of subparagraphs (E) and (F) of Section 1369(b)(1) make plain that the courts of appeals lack original jurisdiction over challenges to the WOTUS Rule.

Section 1369(b)(1)(E). Subparagraph (E) grants original jurisdiction to the courts of appeals over an EPA action "in approving or promulgating any effluent

limitation or other limitation." 33 U.S.C. § 1369(b)(1)(E). The CWA defines an "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." *Id.* § 1362(11). The CWA does not define "other limitation."

As the Agencies have conceded, the WOTUS Rule is not an "effluent limitation." *See In re U.S. Dep't of Defense, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S. ("In re WOTUS Rule")*, 817 F.3d 261, 266 (6th Cir. 2016) (McKeague, J.). It does not "restrict" the "quantities, rates, and concentrations" of pollutants discharged "from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

Instead, the Agencies contend that the WOTUS Rule is an "other limitation under section 1311" because it "*has the effect of* restricting the actions of property owners who discharge pollutants from a point source into covered waters," and "*it has the effect of* imposing limitations or restrictions on regulatory bodies charged with responsibility for issuing permits under the [National Pollutant Discharge Elimination System ("NPDES")] to those who discharge pollutants into covered waters." *In re WOTUS Rule*, 817 F.3d at 266 (McKeague, J.) (emphases added). True enough: the WOTUS rule will have those *effects*. But the Rule *itself* is not an "other limitation" within the meaning of subparagraph (E) for the simple reason that the Rule standing alone does not

limit anything. *See Friends of the Everglades*, 699 F.3d at 1286 (defining "limitation" as a "restriction") (quoting Black's Law Dictionary 1012 (9th ed. 2009)). Instead, the WOTUS Rule "operates in conjunction with other sections scattered throughout the Act to define when its restrictions even apply." *In re WOTUS Rule*, 817 F.3d at 276 (Griffin, J.).

Even if the phrase "other limitation" could be read to encompass a rule that is not itself a limitation, subparagraph (E) still would not encompass the WOTUS Rule because the rule is not an "other limitation *under Section 1311*." 33 U.S.C. § 1369(b)(1)(E) (emphasis added). "[T]he plain text of [subparagraph] (E) clearly delineates what the limitations are, and what they are not: the 'limitations' set forth in §§ 1311, 1312, 1316, and 1345 provide the boundaries for what constitutes an effluent or other limitation." *In re WOTUS Rule*, 817 F.3d at 276 (Griffin, J.). The definitional section the WOTUS Rule modifies—*viz.*, "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(12)—does not arise from these sections. "It is a phrase used in the [CWA's] definitional section, § 1362, and no more." *In re WOTUS Rule*, 817 F.3d at 276 (Griffin, J.). Accordingly, "the lack of any reference to § 1362 in [subparagraph] (E) counsels heavily against a finding of [original] jurisdiction" in the court of appeals. *Id.*; *see also Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("It would be an odd use of language to say 'any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title' in § 1369(b)(1)(E) if the references to particular sections were not meant to exclude others.").

Indeed, the WOTUS Rule "appl[ies] to all provisions of the [CWA]," including those within the Corps' domain. 80 Fed. Reg. at 37,104. But Section 1369(b)(1) limits jurisdiction only to *EPA* actions, not to actions of both Agencies. The "joint nature of the rulemaking" indicates that this is not an EPA-specific effluent or other limitation. *Loan Syndications & Trading Ass'n*, 818 F.3d at 722.

Section 1369(b)(1)(F). Subparagraph (F) grants original jurisdiction to the courts of appeals over an EPA action "in issuing or denying any permit under section 1342 of this title." Naturally read, subparagraph (F) applies only when the EPA has "issu[ed]" or "den[ied]" a particular permit to discharge pollutants into a navigable water under 33 U.S.C. § 1342. *See, e.g.*, *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1161-62 (9th Cir. 1999) (finding original jurisdiction under subparagraph (F) to review an EPA decision "to issue [NPDES] permits to five municipalities").

The WOTUS Rule did not "issue" or "deny" any permit and is "definitional" only. 80 Fed. Reg. at 37,054. It made no individualized permitting decisions of any kind. *See Friends of the Everglades*, 699 F.3d at 1288 (finding no jurisdiction under subparagraph (F) over "a general rule, as opposed to a decision about the activities of a specific entity"). As such, subparagraph (F) does not grant the courts of appeals original jurisdiction over challenges to the WOTUS Rule.

B. Longstanding Canons of Statutory Construction Confirm That the Courts of Appeals Do Not Have Original Jurisdiction Over Challenges to the WOTUS Rule.

The Agencies' interpretation of Section 1369(b)(1) also fails under two important canons of statutory construction.

Expressio Unius Est Exclusio Alterius. Under this doctrine, "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary (7th ed. 1999). "[T]he canon *expressio unius est exclusio alterius* ... has force ... when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). "For instance, if the statute in question enumerates the matters over which a court has jurisdiction, no other matters may be included." Sutherland, Stat. Const. § 195 (4th ed.); *see, e.g., Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006). "The more specific the enumeration, the greater the force of the [*expressio unius*] canon." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 108 (2012).

The Agencies' interpretation of Section 1369(b)(1) disregards the doctrine of *expressio unius* by expanding the CWA's jurisdictional reach to include EPA actions that are not enumerated in Section 1369(b)(1). Congress gave the courts of appeals original jurisdiction over seven categories of EPA actions. 33 U.S.C. § 1369(b)(1)(A)-(G). By doing so, it made clear that those courts do not have original jurisdiction over any other EPA actions taken

under the CWA. *See Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003). Indeed, the courts of appeals "do not lightly hold that [they] have jurisdiction under section 1369(b)(1)" because "the specificity and precision of Section 1369, and the sense of it" demonstrate that the statute is "designed to exclude EPA actions that Congress did not specify." *Nw. Envt'l Advocates*, 537 F.3d at 1015.

Here, Congress specified seven categories of EPA actions that belong in the courts of appeals—none of which can reasonably be construed to cover an administrative rule defining the term "waters of the United States" under the CWA. The courts should respect this legislative choice. *See Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1988) ("[T]his court simply is not at liberty to displace, or to improve upon, the jurisdictional choices of Congress—even when it legislates by potpourri—no matter how compelling the policy reasons for doing so.").

The Agencies' "flexible" interpretation of Section 1369(b)(1) would embrace EPA actions not included within the CWA's enumerated categories. "If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the [CWA]." *North Dakota v. EPA*, No. 15-59, 2015 WL 5060744, at *1 (D.N.D. Aug. 27, 2015). This is not what Congress intended. If Congress wanted to grant original appellate review of more fundamental decisions, it easily could have done so. *See Longview Fibre Co.*, 980 F.2d at 1313.[2]

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2. Congress knows precisely how to grant the courts of appeals original jurisdiction over all final orders of a particular

Canon Against Surplusage. All else being equal, "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). But under the Agencies' sweeping interpretation of Section 1369(b)(1), the reach of subparagraphs (E) and (F) would be so broad as to make meaningless other provisions of Section 1369.

For example, subparagraph (A) specifically grants courts of appeals original jurisdiction over an EPA action "promulgating any standard of performance under section 1316" for new point sources of pollutants. 33 U.S.C. § 1369(b)(1)(A). But if subparagraph (E) were construed so that "other limitation" means any rule or final agency action "whose practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities," *In re WOTUS Rule*, 817 F.3d at 270 (McKeague, J.), then subparagraph (E) would subsume subparagraph (A), which would serve no function. Congress would have had no need to include it because a standard of performance under Section 1316 will always limit (directly or indirectly) the discharge of pollutants from new point sources. *See* 33 U.S.C. § 1316(a)(1) (authorizing standards of performance "for the *control* of the discharge of pollutants"); 40 C.F.R. § 401.11(k) (defining standard of performance as a "restriction" on discharges). The Court should not interpret the CWA in a way that produces such a result. *See Am. Paper Inst.*,

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agency. *See, e.g.*, 28 U.S.C. § 2342(1) (all final orders of the FCC are reviewed directly in the courts of appeals); 49 U.S.C. § 46110 (all final orders of the FAA are reviewed directly in the courts of appeals); 15 U.S.C. § 78y(a) (all final orders of the SEC are reviewed directly in the courts of appeals).

Inc. v. EPA, 890 F.2d 869, 876-77 (7th Cir. 1989); *Friends of the Earth*, 333 F.3d at 190-91 & n.14.

Similarly, subparagraph (C) grants courts of appeals original jurisdiction over an EPA action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317." 33 U.S.C. § 1369(b)(1)(C). Section 1342, in turn, authorizes the EPA to "issue a permit for the discharge of any pollutant ... upon condition that such discharge will meet ... all applicable requirements under sections 1311, 1312, 1316, *1317*, 1318, and 1343 of this title." 33 U.S.C. § 1342(a)(1) (emphasis added). If subparagraph (F) is construed so that "issuing or denying any permit" means all "regulations governing the issuance of permits," *In re WOTUS Rule*, 817 F.3d at 271 (McKeague, J.), then subparagraph (C) likewise would be superfluous—Congress would have had no need to enact it because *every* promulgation under Section 1317 will necessarily affect the permitting process. Congress could not have intended this result.

C. There Is No Basis for Invoking Policy or Practical Considerations to Conclude That the Sixth Circuit Had Jurisdiction.

The Agencies argue that the Court should consider "policy" implications and take a "practical" approach to interpreting Section 1369(b)(1). *In re WOTUS Rule*, 817 F.3d at 268 (McKeague, J.). Employing this approach, the Agencies contend, would avoid "a waste of judicial and party resources, delays, and possibly even different results." *Id.* at 277 (Griffin, J.).

But a court is "not at liberty to rewrite the statute because [it] might deem its effects susceptible of improvement." *C.I.R. v. Lundy*, 516 U.S. 235, 252-53 (1996); *see Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) ("Our job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'"); Scalia & Garner, *supra*, at 343-46. Here, "Congress could have declared" all EPA actions—or even this particular definitional determination—reviewable in the courts of appeals; but "[f]or better or worse, it used the narrower word[s]" contained in Section 1369(b)(1). *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 878 (2014). This Court is bound by Congress's decision. In the end, "these always-fascinating policy discussions are beside the point. The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage*, 134 S. Ct. at 892 (citation omitted).

The Agencies rely on *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), to support their assertion that the Court has employed a "practical" approach to reviewing the CWA's jurisdictional provisions. *In re WOTUS Rule*, 817 F.3d at 266-73 (McKeague, J.). Neither case, however, supports this proposition.

In *E.I. du Pont*, the Court determined that the Fourth Circuit had original jurisdiction under subparagraph (E) to review "industrywide regulations limiting discharges by existing [inorganic chemical manufacturing] plants." 430 U.S. at 115. That was because subparagraph (E) "unambiguously authoriz[es] court of appeals review of EPA action promulgating an effluent limitation for existing

point sources under [section 1301]," and the relevant EPA actions were indeed effluent limitations under Section 1301. *Id.* at 136. The Court rejected the argument that subparagraph (E) provided for review only of "[a] grant or denial of an individual variance" under Section 1301 (and not for classes and categories of effluent limitations). *Id.* Beyond conflicting with the text, "petitioners' construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section 1342] but would have no power of direct review of the basic regulations governing those individual actions." *Id.*

The Agencies seize on the Court's "perverse situation" wording to argue that the Court requires a "practical" interpretation of subparagraph (E). *In re WOTUS Rule*, 817 F.3d at 267 (McKeague, J.). Just as the Court in *E.I. du Pont* was concerned with bifurcating judicial review, the Agencies contend, the Court should also interpret subparagraph (E) to encompass the WOTUS Rule because it would be "truly perverse" if the courts of appeals had the authority to review numerous individual actions in which EPA issued or denied NPDES permits but not "the basic regulations governing" those permitting decisions (*i.e.*, the WOTUS Rule). *In re WOTUS Rule*, 817 F.3d at 267 (McKeague, J.) (quoting *E.I. du Pont*, 430 U.S. at 136).

But *E.I. du Pont* cannot be stretched this far. The Court's "policy reason came *after* a plain textual rejection of the industry's position." *In re WOTUS Rule*, 817 F.3d at 278 (Griffin, J.). The Court's bifurcation concerns did not drive the jurisdictional analysis in the first instance. "It is, therefore, a far stretch to take this dicta and expand it ... to find jurisdiction proper when a regulation's 'practical

effect' only sets forth 'indirect' limits." *Id.* Moreover, the regulations at issue in *E.I. du Pont* actually involved effluent limitations, whereas "the Agencies here admit they have not promulgated an effluent limitation." *Id.* Thus, the Court's concern that it would be bizarre if a court of appeals could review permit decisions but not the effluent limitations underlying them is not present here. In sum, nothing in *E.I. du Pont* licenses this Court to overlook Section 1369(b)(1)'s text. *Id.*; *see id.* at 283 (Keith, J., dissenting).

Crown Simpson likewise does not authorize the Court to override the text. There, the Court reviewed whether subparagraph (F) gave the courts of appeals original jurisdiction to review an EPA action "denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized state agency." 445 U.S. at 194. The Ninth Circuit had held that it lacked original jurisdiction because the EPA "did no more than *veto* an NPDES permit proposed by the state authority," and therefore, did not actually "issue or deny" a permit. *Id.* at 196. This Court disagreed, holding that when the EPA "objects to effluent limitations contained in a state-issued permit, *the precise effect* of its action is to 'den[y]' a permit within the meaning of [subparagraph (F)]." *Id.* (emphasis added). Otherwise, the Court explained, "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-97. "Absent a far clearer expression of congressional intent," the Court was "unwilling to read the [CWA] as creating such a seemingly irrational bifurcated system" over "functionally similar" actions. *Id.* at 197.

As with *E.I. du Pont*, the Agencies read *Crown Simpson* to require a broad, "practical" interpretation of subparagraph (F). *In re WOTUS Rule*, 817 F.3d at 273 (McKeague, J.). The Agencies contend that *Crown Simpson* grants courts of appeals original jurisdiction not only over EPA actions "issuing or denying a permit," 33 U.S.C. § 1369(b)(1)(F), but also "regulations governing the issuance of permits," *In re WOTUS Rule*, 817 F.3d at 283 (McKeague, J.) (quoting *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009)). Because the WOTUS Rule is a regulation related to permits, the Agencies contend, the courts of appeals have original jurisdiction to review the rule.

But *Crown Simpson*, too, cannot be stretched this far. "The facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense." *Nw. Envt'l Advocates*, 537 F.3d at 1016. Had the EPA not given California the authority to designate NPDES permits, the EPA would have retained the power to grant or deny permits directly. The Court thus concluded "that the fortuitous circumstance that this case arose in a State with permit-granting authority should not produce a different jurisdictional result from a case involving a state without such authority." *Id.* "With this factual overlay, the Court's 'precise effect' exception makes sense." *In re WOTUS Rule*, 817 F.3d at 281 (Griffin, J., concurring). It would have been "perverse" there to read those "functionally similar" situations differently.

But that concern has no application here. "It stretches the plain text of [subparagraph] (F) to its breaking point to hold that a definition setting the [CWA's] boundaries has, under *Crown Simpson*, the 'precise effect' of or is

'functionally similar' to, approving or denying an NPDES permit." *Id.* At most, the WOTUS Rule "informs whether the [CWA] requires a permit in the first place, not whether the Agencies can (or will) issue or deny a permit." *Id.*; *id.* at 283 (Keith, J., dissenting). The mere fact that the WOTUS Rule "relates to" the issuance of Section 402 permits does not amount to an *issuance or denial* of a Section 402 permit. *Friends of the Everglades*, 699 F.3d at 1288. Therefore, nothing in *Crown Simpson* authorizes the Court to disregard the statutory text.

II. To the Extent That Policy and Practical Concerns Are Relevant Considerations, They Support Finding No Original Jurisdiction in the Sixth Circuit.

The Court need go no further than the plain text of Section 1369(b)(1) to reverse. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) ("The starting point for the analysis is the statutory text. And where, as here, the words of the statute are unambiguous, the judicial inquiry is complete."). To the extent that the Court finds policy and practical concerns to be relevant, however, they *support* finding jurisdiction in the district courts. The Petitioner's interpretation of the Section 1369(b)(1) ensures that: (1) litigants are not unduly deprived of their ability to challenge EPA actions outside of the 120-day deadline; (2) litigants have certainty over where they must bring their challenge to an EPA action; and (3) the WOTUS Rule and other EPA actions with nationwide implications receive thorough judicial review.

First, construing Section 1369(b)(1) in accordance with its plain meaning ensures that litigants do not lose their ability to challenge EPA actions outside of the 120-day

deadline. When Section 1369(b)(1) requires initial review in the courts of appeals, the action must be challenged within 120 days of its promulgation. *See* 33 U.S.C. § 1369(b)(2). After this time period has expired, Section 1369(b)(2) bars "judicial review" in *any* future "civil or criminal proceeding for enforcement." *Id.*; *see Decker v. Nw. Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1334 (2013). This "120-day time limit is well-established, and ... strictly enforced." *Nat'l Pork Producers v. EPA*, 635 F.3d 738, 754 (5th Cir. 2011). Thus, if the Agencies are right that Section 1369(b)(1)(E) or (F) applies here, then Section 1369(b)(2) purports to bar a defendant in an enforcement action, even in a criminal prosecution, from raising constitutional or statutory challenges to the WOTUS Rule as applied. This is all the more reason to reject the Sixth Circuit's interpretation.

Because of the draconian nature of Section 1369(b)(2), the Court should be exceptionally wary of extending its reach too broadly and thereby endangering the ability of ordinary individuals and small businesses—particularly as defendants—to challenge the legality of agency action. The APA "creates a 'presumption favoring judicial review of administrative action." *Sackett v. E.P.A.*, 566 U.S. 120, 128 (2012). When a law restricts APA review, therefore, courts construe the limitation narrowly: "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

"A special hazard arises when review is available directly to the court of appeals, because availability of direct review forecloses review in certain enforcement

proceedings." *Longview Fibre Co.*, 980 F.2d at 1309. "Reviewability under Section 1369 carries a peculiar sting," which "cuts against [any] argument that a grant of appellate review should be construed liberally." *Id.* at 1313; *see also Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) ("The review-preclusion proviso in [Section 1369(b)(2)] dissuades us from reading [Section 1369(b)(1)] broadly; the more we pull within Section 1369(b)(1), the more arguments will get knocked out by inadvertence later on."). For example, if original review in the court of appeals is required for all rules with some relation to the permitting process, then ordinary landowners—or future landowners, who might be entirely unaware of this rule—might be barred from later challenging any part of it in future actions. The Court should not interpret the statute to deny landowners an opportunity to mount a full defense when an enforcement action is brought.

The WOTUS Rule is a perfect example of this danger. An ordinary homeowner with an intermittent stream in his backyard likely assumes that his *local* land is not subject to a federal law regulating *navigable* waters. But if the decision below stands, then a landowner may be barred from challenging the WOTUS Rule when forced to defend against an enforcement action. Indeed, the CWA's "reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) (quoting *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring)). Given these potential harms, Section 1369(b)(1) should not be read to bar judicial review, and certainly not without a clear indication from Congress that the 120-day limitations period has broad applicability. *See Edward J. DeBartolo Corp. v. Florida*

Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Second, Petitioner's interpretation reflects the Court's instructions for simple, straightforward interpretations of jurisdictional rules. The Court has long instructed that "vague boundaries" are "to be avoided in the area of subject-matter jurisdiction wherever possible.'" *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (citation omitted). "[A]dministrative simplicity is a major virtue in a jurisdictional statute" because "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* Indeed, uncertainty as to when and where agency action may be challenged could raise due-process concerns. *Cf. Grayned v. Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). For these reasons, courts should employ "straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.*, 559 U.S. at 94.

Amici's litigation over the WOTUS Rule illustrates these concerns. *Amici* filed their lawsuits (a declaratory-judgment action in the Northern District of Oklahoma and a protective petition for review in the Tenth Circuit) in July 2015. But almost two years later, these and other WOTUS Rule challenges remain stalled due to uncertainty about where jurisdiction properly lies. Instead of following

the plain words of the text, the parties in *Amici*'s cases have been fighting over whether the WOTUS Rule must be challenged in the courts of appeals for "practical," "flexible," and "pragmatic" reasons. This uncertainty has caused the parties—and the taxpayers—to "eat[] up time and money" not over the merits, but over the forum in which the merits should be litigated. *Hydro Resources, Inc.*, 608 F.3d at 1160 n.23; *Longview Fibre Co.*, 980 F.2d at 1314 (lamenting the "tremendous resources in time and money" invested in determining proper forum). Petitioner's plain reading of Section 1369(b)(1) would provide greater certainty in determining the proper forum in which litigants should bring challenges to EPA action.

Finally, Petitioner's interpretation ensures that the WOTUS Rule and other EPA actions with national implications may receive "full consideration by the courts of appeals." *E.I. du Pont*, 430 U.S. at 135 n.26. This Court has long emphasized "the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). When multiple courts examine a difficult question, it promotes the "thorough development of legal doctrine by allowing litigation in multiple forums." *Id.* at 163. Indeed, the Court recently stressed the importance of such robust review. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

Reversing the Sixth Circuit's decision and allowing the district courts to exercise jurisdiction over challenges to the WOTUS Rule would ensure that they will be examined by "thorough, scholarly opinions written by some of our finest judges." *E.I. du Pont*, 430 U.S. at 135. Courts considering the validity of the WOTUS Rule may

reach differing conclusions about its validity. Whatever the result, litigation of these cases in different courts would provide an opportunity for rigorous federal review, and thus an "increase[d] probability of a correct disposition," than if review is confined exclusively in the Sixth Circuit. *Atchison, Topeka & Santa Fe R.R. Co. v. Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring).

By seeking to expand Section 1369(b)(1) to centralize review in the Sixth Circuit, the Agencies are attempting to short-circuit the usual judicial percolation process. Although it might be an effective litigation strategy to "squelch the circuit disagreements that can lead to Supreme Court review," *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002), accepting the Agencies' interpretation would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," *Mendoza*, 464 U.S. at 160.

Under the Agencies' reasoning, all federal challenges to the same agency actions should be transferred and consolidated into one court of appeals if there is a non-frivolous interpretation for doing so. But this is not what Congress has commanded. Unlike other statutes that place *all* agency actions in the courts of appeals, *see supra* 11 n.2, Congress did so for only seven specific categories of EPA actions under the CWA. That strongly suggests that Congress intended for the traditional, multi-level review to apply in most cases. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 861-62 (1994); *see also In re Clean Water Rule: Definition of "Waters of the United States"*, 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015) (denying transfer and centralization of all district court challenges to the

WOTUS Rule). "It is Congress's job, not [the Court's], to determine the court in which judicial review of agency decisions may occur." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1337 (D.C. Cir. 2013).

CONCLUSION

For these reasons, the Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
SHELDON B. GILBERT
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

KAREN R. HARNED
LUKE A. WAKE
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2048

Counsel for the National Federation of Independent Business

WILLIAM S. CONSOVOY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

MICHAEL H. PARK
CONSOVOY MCCARTHY PARK PLLC
Three Columbus Circle, 15th Floor
New York, NY 10019
(212) 247-8006

Counsel for Amici Curiae